TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 154.

THE CITY OF DAWSON, APPELLANT,

vs.

THE COLUMBIA AVENUE SAVING FUND, SAFE DEPOSIT, TITLE AND TRUST COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA.

FILED DECEMBER 6, 1904.

(19,152.)

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a In the Circuit court of the United States for the Northern District of Georgia, Western Division. Fifth Circuit. In Equity.

THE COLUMBIA AVENUE SAVING FUND, SAFE DEPOSIT, TITLE and Trust Company, Trustee, Complainant.

versus

THE CITY OF DAWSON, W. B. CHEATHAM, J. G. DEAN, J. S. Lowrey, Charles Deubler, F. M. Jennings, F. Nasworthy, F. M. McNulty, A. J. Baldwin, and John Seay, Dawson Water Works Company, Defendants.

Solicitors for Complainant: Hall & Wimberly, Macon Georgia; J. G. Parks, Dawson, Georgia.

Solicitors for Defendants: Guerry & Hall, Macon, Georgia; J. A. Laing, M. C. Edwards, Dawson, Georgia.

1 To the honorable judges of the circuit court of the United States for the western division of the northern district of Georgia:

The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, a corporation created by, and doing business under the laws of, the State of Pennsylvania, and having its office and place of business in the City of Philadelphia, County of Philadelphia, and State of Pennsylvania, brings this its bill against the City of Dawson, a municipal corporation in the County of Terrell, said State of Georgia, created and exercising its municipal and corporate functions under the laws of the State of Georgia, and a citizen of the State of Georgia, and against W. B. Cheatham, of Terrell County, Georgia, and a citizen of the State of Georgia, said W. B. Cheatham holding at this time the office of mayor of said City of Dawson, and against J. G. Dean, J. S. Lowrey, Chas. Deubler, F. M. Jennings, F. Nasworthy and F. M. McNulty, all and singular of Terrell County, Georgia, and citizens of the State of Georgia, and at this time being the alderman of the City of Dawson, and against A. J. Baldwin, of said Terrell County, Georgia, and a citizen of the State of Georgia, and against Jno. Seay, city marshal of Dawson, said Seay being of Terrell County, Georgia, and a citizen of the State of Georgia, and against the Dawson Water Works Company, a corporation created by, and existing under the laws of the State of Georgia, and located and doing business in said Terrell County, Georgia.

And thereupon your orator complains and says as follows:

I. Heretofore, to-wit, on the first day of September, A. D. 1891, the Dawson Water Works Company constituted your orator trustee for such person or persons, body or bodies politic as should become holders of eighty certain first mortgage bonds of the said Dawson Water Works Company, of five hundred dollars each, amounting in the aggregate to forty thousand dollars ($40,000), and on said date mortgaged, conveyed and set over unto your orator as such trustee, and its successors, by deed of trust, for the use, benefit and security of such bondholders, and in order to better secure the payment of said bonds, and the interest to accrue thereon, all and singular the real estate and personal property, coroporate rights and franchises, privileges and appurtenances of the said Dawson Water Works Company; together with any and all income, rents, earnings, issues and profits then or thereafter payable to said company, and in particular the income payable to said company, or the trustee for its bondholders, under and by virtue of the contract with the City of Dawson hereinafter more fully set forth.

2 In said deed of trust a sinking fund is provided for, to be raised from the income of said Water Works Company.

Said bonds are dated September 1st, 1891, and are payable in lawful money of the United States on the first day of September, 1916, and bear interest from the date thereof at the rate of six per cent. per annum, payable on the first days of March and September in each year; and it is covenanted and stipuated by said Water Works Company in and by said bonds and said deed of trust that the yearly rental which the City of Dawson, by its contract, hereinafter more fully set forth, bound itself to pay for water for fire protection, amounting to two thousand dollars per annum, payable semi-annually, should be paid into the hands of the trustees for interest purposes.

The terms, conditions and trusts of the said deed, and powers and duties thereby conferred upon, and raised on the part of your orator, will fully appear by reference to the said deed. Your orator attaches hereto a copy of said deed, and marks the same "Exhibit A," and prays leave for reference thereto as often as may be necessary. The original deed will be to the Court shown.

II. Said bonds, so secured as aforesaid, were duly issued and sold as contemplated, and are now held by persons who purchased the same in open market for value, and your orator thereby became and is trustee for the holders of said bonds in accordance with the provisions of said deed.

III. Said bonds were issued and sold by the Dawson Water

Works Company in order to realize the money wherewith to construct and equip a complete system of waterworks, for the purpose of carrying out the contract with the City of Dawson, in the aforesaid deed refer-ed to. The money was advanced for that purpose by the original purchaser of the bonds, under an agreement that bonds, secured as aforesaid, were to be issued and delivered in payment for the money so advanced as soon as the said system of waterworks were installed. The aforesaid contract with the said City of Dawson furnished the necessary and principal source of revenue from which the interest on said bonds was to be paid, and raised a sinking fund with which to pay ultimately the said bonds; and without the revenue from this source it would not have been possible to pay the interest on the cost of the works, the revenue from all other sources being only about sufficient to pay cost of operation, and the bonds could not have been floated, and said waterworks would not, and could not have been built.

IV. Said contract was entered into by the said City of Dawson under the circumstances, and for the purpose now here stated, namely:

3 On February 21st, 1890, the City of Dawson, regularly acting in its corporate capacity by and through its Mayor and Aldermen, known and styled as the City Council of Dawson, by formal ordinance entered into a contract with I. L. Bennett of Philadelphia, Penn., and his associates, their successors and assigns, who were to organize a company, who were to be incorporated under the general incorporation laws of the State of Georgia, into a body corporate to be styled "The Dawson Water Works Company," by which contract it was agreed and stipulated that said Company, within the time therein limited, were to construct, complete and have in operation, a complete and thorough system of water works, in accordance with the specifications and requirements of the contract, and were from time to time to extend its mains and pipes, enlarge its plant, and generally enlarge its system to meet increasing demands consequent upon the growth of the city; and, in consideration of said company furnishing a free and unrestricted use of its water, in case of fire, for protection against conflagration, for the period of twenty years, said City of Dawson, in and by said contract, undertook and agreed to pay to said Dawson Water Works Company, or to such Trust Company as the said Dawson Water Works Company might decide upon as trustee for their bonds, the sum of two thousand dollars annually for twenty years, in semi-annual payments of one thousand dollars each, on the first day of January and July of each year. And said ordinance, constituting the contract, further provides that said City Council of

Dawson shall, and they are thereby required to make pro-
lars, by levying a tax sufficient for that purpose upon the
taxable property of the city. Said contract specifies the num-
ber of fire plugs to be established, and provides for increasing
vision each year, for the payment of said two thousand dol-
the number as the city increases in size. Said contract limits
the prices to be charged private consumers, and contains other
provisions, all of which will fully and at large appear in the
copy of said contract hereunto attached marked "Exhibit
B," and by reference made a part hereof.

Said contract was made and entered into by the City of Dawson for the purpose of affording adequate fire protection, as well as a supply of water for the use of its inhabitants. The contract was the plan adopted by the City Council of Dawson to furnish to said city and its inhabitants the benefits of waterworks, after a careful and business-like investigation as to how these purposes might be accomplished in the best and most economical manner.

V. Your orator shows that said contract was entered into by said City of Dawson, with the full knowledge and
4 free assent of the inhabitants composing and constituting said municipal corporation.

In May, 1886, the City Council of Dawson resolved to submit to popular vote the question of incurring the expense of waterworks. In pursuance of said resolution of the City Council an election was called for June 11th, 1886, and notice was published once a week for four weeks in the Dawson Journal, (a newspaper of wide and general circulation in said city, and the public gazette in which legal notices are published for said City, and the county wherein it is situate), that on the day named an election would be held to determine whether the City of Dawson "shall incur the expense of waterworks." On the day named the election was held as prescribed by law for the holding of municipal election in said city. A full vote was had, and more than two-thirds of the qualified voters of said city voted in favor of incurring the expense of waterworks. The result was duly declared by said City Council to be in favor of waterworks, and by resolution was entered upon the records of the city. Notice thereof, in due form, officially signed by the Mayor of said city, was published regularly in the aforesaid newspaper, the Dawson Journal.

Every citizen and inhabitant of said City of Dawson acquiesced in said submission of the question to popular vote, and in the declared result. No citizen, tax payer, or inhabitant objected to the form of the submission, or the sufficiency of the notice, or to the scope of the powers and latitude of

descretion thereby reposed in the City Council, who constituted the city's managing agents.

The City Council of Dawson afforded to their constituency, the said City of Dawson, ample opportunity to object to the carrying out of the declared will of the qualified voters of said city. They did not act hastily or precipitately, but slowly and carefully, during more than three and a half years, investigated different plans and systems, so as to take such action as would in their judgment best carry out the purposes, and secure the benefits and protection of water works for said city.

The contract finally entered into by said City of Dawson, on February 21st, 1890, was published in full in the aforesaid public gazette, the Dawson Journal, and its full contents, and every feature and provision thereof, was brought within the ready reach of every inhabitant of said city. Every citizen, tax payer and inhabitant accepted the contract as the authorized act of the City of Dawson, and the same was acquiesced in by every one, and no objection was made to, or step taken to prevent, the carrying out of said contract.

5 VI. In pursuance of said contract, the Dawson Water Works Company was organized, and incorporated under the general incorporation laws of the State of Georgia, for the purpose and object of complying with and carrying out the provisions of the contract. Its application for charter was duly published in the Dawson Journal, as required by law, and the purpose for which said company was organized was generally known to the inhabitants who constituted the said City of Dawson.

The incorporators of said Dawson Water Works Company, and said company, constructed and built a complete and thorough system of waterworks, in accordance with the specifications and requirements of said contract, and for the purpose of carrying out said contract. Said system was fairly and fully tested by the city of Dawson, and was found to be fully up to the contract requirements and satisfactory in every particular. On August 12th, 1891, the City Council of Dawson adopted a resolution declaring that after fully testing said system of waterworks, the same was accepted by the city as fully complying with the contract, and that said system in many particulars exceeded the contract, and in no particular fell below the requirements of the contract.

From said date the Dawson Water Works Company has continued to maintain and operate said system of waterworks in full compliance with the requirements of said contract, and has furnished to the City of Dawson free and unrestricted use of its water, for protection against fire, in accordance with the

contract, and in every respect has faithfully met, observed, kept and performed all the obligations resting upon it under and by virtue of said contract.

The said City of Dawson has from said August 12th, 1891, continuously till the present at all times enjoyed and possessed said fire protection under and by virtue of said contract, and has used said water for the purpose of extinguishing fire, and preventing the spread of conflagration, as often soever as fires requiring the services of the fire department have occurred in said city.

VII. The inhabitants composing the said City of Dawson not only assented to, and acquiesced in the action of their corporate agents in making said contract, but silently stood by and permitted the Dawson Water Works Company to lay out and expend large sums of money in the purchase of pipes, materials and machinery, the laying of mains, the erection of a stand pipe and pumping station, and the other expenses incident to the installation of a first class waterworks system, in order to carry out said contract. During the eighteen months which elapsed between the making of the contract and
6 the completion of the works the large force of hands employed, the excavation of the streets, and the laying of pipes in every part of the city, and the large outlay of money expended in erecting said plant, in accordance with the contract, could not fail to have been seen and known by every citizen of Dawson. No injunction was applied for, no protest made, but the citizens all assented to the arrangements by which said company, at a cost of more than forty thousand dollars, have put themselves in a position to carry out their part of the contract. The inhabitants of said city, by their silence and acquiescence have secured to themselves the benefits of a water supply for their homes and their families, and their places of business, as well as fire protection for their property.

VIII. Your orator shows that it was known and contemplated by said City of Dawson, at the time of entering into said contract, that the money required to build said system of waterworks was to be raised in whole or in a large part from the issue and sale of the bonds of the Dawson Water Works Company, and that said rentals which the City of Dawson was to pay would constitute the source from which said bondholders were to be paid the interest on their bonds, and ultimately pay said bonds, and that said bonds would derive their value from said contract. And in order to render said bonds more desirable, the City of Dawson, in and by said contract, agreed and promised to pay to the trustee for bondholders said two thousand dollars stipulated to be paid by it annually. By said provision of the contract the City of Dawson invited

persons to become purchasers of said bonds, upon the faith that said City would keep and perform the obligations contained in said contract.

IX. The bonds of said Dawson Water Works Company, issued as contemplated by said contract, were negotiated and sold, upon the faith that the City of Dawson would pay said two thousand dollars annually as by said contract it had promised to do. The proceeds of said bonds, amounting to forty thousand dollars, or other large sum, were used in the construction of said system of waterworks.

Both the original purchaser who furnished the money to construct said waterworks, and the present holders of said bonds, who afterwards purchased the same for value in open market, relied, and had a right to rely upon the City of Dawson's aforesaid contract, and acted upon the faith that the same was a valid and binding obligation.

Said contract had been entered into by the City Council of Dawson, by and with the assent of the citizens of said city.

The citizens had acquiesced in, and by their conduct had
7 ratified the action of their corporate agents in making the contract, even if authorization on their part had been necessary. While the Constitution of the State of Georgia provides that no municipality shall incur a debt without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, yet it had not been decided by any court in Georgia prior to the making of the contract in question that such a contract created a "debt."

But, on the contrary, it had been decided by the Supreme Court of Georgia, which decision was unreversed at the date said contract was made, that a contract of this character did not create a debt.

X. Your orator shows that on June 27th, 1894, the City Council of Dawson passed a resolution that said City Council decline to carry out the contract with the Dawson Water Works Company, hereinbefore set forth. Since said date the City of Dawson, its then Mayor, A. J. Baldwin, hereinbefore named as defendant, and the other defendants hereinbefore named, and their confederates and abettors, have been engaged in the common scheme and purpose of repudiating, annulling and destroying said contract.

Your orator shows that said action was not brought about by any failure of the Dawson Water Works Company to comply with its part of the contract. Had there been such failure, the contract itself furnished a sufficient remedy, without the necessity of resorting to a repudiation of the contract; and it would only have been necessary for the City to specify the defect or failure, and unless remedied within such reasonable

time as should be allowed for making repairs, the franchise of said company, by the terms of the contract, could be declared forfeited by the city. During the time the said waterworks had been in operation no complaint of any kind had been made as to the character of the service rendered, as to the pressure, or the quantity of the water, or as to any other matter. The Water Works Company had at all times complied fully with its said contract, and had furnished adequate and satisfactory service and protection.

At the time said resolution was adopted, said City Council of Dawson were considering the question of purchasing the waterworks owned by said Dawson Water Works Company, and embraced in the aforesaid deed of trust. And it was pending the discussion and consideration of the question of purchase, and the letters and replies relative thereto, that said resolution was moved and carried. Your orator charges that the purpose said city had in repudiating the contract was to destroy the value of said waterworks property, by withdrawing from it the revenues necessary to the existence of
8 the company, and thereby force said company to sell said system of waterworks to the city at such price as the city saw fit to name. The Dawson Water Works Company was willing to sell to said city said system of waterworks for what they were fairly and reasonably worth. But the City of Dawson wished to purchase said waterworks for very much less than their cost, and very much less than their value. The price offered by the city, if accepted, would have left a large portion of the bonded indebtedness unprovided for, as it was for less than the bonded indebtedness, and said company had no other property. Your orator submits that the conduct of said city in endeavoring to force a sale at such price by repudiating its contract was unjust and inequitable.

XI. In pursuance of said resolution, and very shortly thereafter, to-wit, on June 29th, 1894, a petition in the nature of a bill for injunction was brought in the Superior Court of Terrell County, Georgia, by A. J. Carver, J. W. F. Lowrey and T. O. Whitehard, as tax payers of said City of Dawson, for an injunction to restrain said city from paying to the Dawson Water Works Company the installment falling due July 1st, 1894, for water under said contract, or from paying for said water in future. Said suit was in form a suit against said City of Dawson for an injunction against said city, but in reality was brought at the instance and re-request of said city, in order to give effect to a resolution already passed by it repudiating the contract, and was prosecuted for plaintiffs by the salaried city attorney of said City of Dawson, ostensibly to restrain his client who was paying him

to sue it; said suit being brought in said form in order to cloak and conceal said city's real purpose of repudiating its contract in order to force the Water Works Company to sell to said city its waterworks. Said suit sought only an injunction against the paying for the water furnished said city for fire protection, and not against the using of the water so furnished. While said suit was pending, said City of Dawson continued to use the water. Upon the hearing the injunction prayed for was refused, and plaintiffs thereafter dismissed said suit.

XII. The City of Dawson had, prior to the resolution of June 27th, 1894, always recognized said contract as a valid, subsisting contract. The taxes required to be levied by the terms of said contract were duly levied, were paid by the tax payers, and the installments falling due under said contract were paid by said city as they matured.

The City of Dawson, having submitted itself to the jurisdiction of the Court, and the Court having refused an in-
9 junction upon the hearing, subsequently paid the installment falling due July 1st, 1894, and thereafter paid the installment due for the last half of the year 1894, save and except a sum which it claimed that said Dawson Water Works Company owed it for taxes, as hereinafter more fully set out. The said City of Dawson has failed and refused to pay the installment falling due under said contract for water furnished it by said Dawson Water Works Company under said contract during subsequent years, namely, the years 1895, 1896, 1897, 1898, and up to the present time, and refuses and has wholly refused to make provision for the annual payment of said installments during said years, or either of them, by levying a tax for that purpose on the taxable property of the city, and has wholly failed and refused from the beginning of the year 1895 to the present time to comply with, keep and perform any of the several obligations of the said contract.

XIII. The said City of Dawson now claims and pretends that it does not now any longer recognize said contract as a valid contract, and that it will no longer be bound thereby. In December, 1894, A. J. Baldwin, mayor of said city, in pursuance of a resolution of the City Council, notified said Dawson Water Works Company that said city would not be bound on its aforesaid contract after January 1st, 1895. Yet the said City of Dawson, notwithstanding the said resolution, and the giving of said notice, and notwithstanding that it professes that it will no longer be bound by said contract, and has withheld payments and repudiated its obligation to lay a tax therewith to make payments for said water and fire protection from and after said January 1st, 1895, has nevertheless con-

tinued from said time to the present to use the water furnished by said Water Works Company under the contract, and to avail itself of the fire protection thereby afforded, exactly as theretofore. Said use of the water, and said enjoyment of the benefits of fire protection, was contemplated and intended by the mayor and aldermen, constituting said City Council, at the time said action; and it was part of their plan and purpose that the City of Dawson should reap and enjoy all the benefits of said company's compliance with the contract, while declining to carry out the cross obligations thereof. The public ordinances of said city providing for the use of said water by the fire department of the city were never repealed; the fire companies were not notified that they were no longer to use it, or forbid its use; no other source was provided by the city council; but hose and other apparatus were furnished them by the city wherewith to use this water, and the persons composing said fire companies were given tax exemptions by said city in consideration of their services in putting out fires with the water furnished for the purpose by the water works company under said contract. The said mayor and council were not only present at said fires and saw the water so used, but within a few weeks after the said A. J. Baldwin, as mayor, addressed said notice to the water works company, he, being still the mayor of said city, and then as well as theretofore and thereafter the prime mover in the repudiation of said contract, assisted with his own hand in turning said water on a burning building in said city, and in thereby putting out said fire, and protecting the adjacent buildings against the spread of conflagration.

XIV. The said Dawson Water Works Company, upon receipt of said letter, at once notified the said city of Dawson, that said company would continue to carry out its part of the contract, and would continue to furnish the pressure therein agreed to be furnished, and that the city would find the fire hydrants ready for service, and the company would expect and require that the city should pay for the same as by the contract stipulated.

Notwithstanding that the city's refusal to pay, has cut off a very large portion of said company's revenues, and left it without adequate means to meet operating expenses and the interest on its bonds, said water works company has fully lived up to the requirements of said contract, and has maintained the pressure called for, and has furnished the said city at all times the free and unrestricted use of its water in cases of fire. During the time that has elapsed since January 1st, 1895, many fires that have broken out in the City of Dawson have been extinguished, or prevented from spreading, by the

use of the water so furnished under said contract, and many thousands of dollars of property belonging to the citizens and tax payers of said city have been thereby saved. Your orator charges that during that time large and valuable property of the said A. J. Baldwin, situate in the very heart of the business portion of said city caught fire, and said fire was extinguished by the use of said water, and a large portion of said town was thereby saved from destruction that would have otherwise been inevitable.

XV. Your orator shows that said city's attempted repudiation of its contract is not due to its inability to pay, or from any change of conditions which makes the contract more burdensome than was contemplated when it was entered into. At the time the contract was made the two thousand dollars called for to be paid annually was less than one-fifth of one per cent. of the assessed value of taxable property therein, and since said time said city has continued to grow in population, and business and tax values. During the 11 past four years that have elapsed since the default in payment for water rent, said City of Dawson has paid out more than the eight thousand dollars due by it for water rent, in erecting and installing and operating an electric light plant, which venture said city has decided to embark in, since reaching its decision to repudiate its aforesaid contract with the Dawson Water Works Company.

XVI. Your orator shows that the City of Dawson has not only failed and refused to pay the annual rentals falling due during the time aforesaid for water, while enjoying the use and benefits of said water so furnished, but has devised other means of injuring the property rights, which form the security for the bonds of said water works company, in violation of said city's aforesaid contract. By said contract it is agreed and provided that said Dawson Water Works Company shall furnish water for certain specified municipal purposes, in addition to the fire protection in said contract elsewhere provided for. And in consideration of the water so to be furnished for said purposes, the City of Dawson thereby obligated itself to pay for the same by remitting all taxes and license fees which might at any time thereafter arise, be assessed or levied by said city against said company, or upon the plant to be used in said water works system.

The water so to be furnished was duly furnished, and said company has fully complied with its part of said agreement. The said water so contracted for and furnished was reasonably and fairly worth the amount of taxes and license fees that would otherwise have been legally exigible of said company or its property. Prior to said city's attempted repudia-

tion of the contract in 1894, said water so furnished had always been accepted by the city as full payment of all taxes assessable against the property of said company, exactly the same in substance and effect as though such taxes had been paid to the city by the company, and the like amount immediately paid back into the hands of said company in payment for said water, and no other payment for said water was ever made by said city, or was other payment contemplated or expected. In 1894 the City of Dawson, without authority of law, and without assessing the same at the times or in the manner required by law, charged the said company an arbitrary amount of money as being the aggregate of taxes on its property for the entire time that had elapsed since the date of said company's organization, and deducted said amount over said company's protest, from the two thousand dollars due by said city for water rent during the year 1894, although all sums due said city for taxes had been paid to said city
12 in water which was worth said sum, and which said city had accepted in full payment therefor. And said amount so deducted and withheld by said city has never been paid to said company, or to your orator as trustee for its bondholders.

Thereafter said City of Dawson assessed, levied and attempted to collect taxes against the said company for the year 1895, though the amount due therefor was paid by said company to said city in water under the aforesaid provision of said contract. Said city caused a tax fi. fa. to be issued therefor against the property of said company, and placed the same in the hands of its then City Marshal, one J. C. Savage, to be collected by seizure and sale of the water works property, which said company conveyed to your orator for the securing of its aforesaid bonds. Said company has obtained a temporary injunction which has up to the present time prevented such sale, but the said fi. fa. is still pending, and said city still persists in its purpose to collect its claim for taxes in violation of said contract, and unless restrained will levy taxes, issue fi. fas., and proceed to enforce the sale of said water works property, in the same way for all subsequent years.

XVII. Your orator shows that after having used said water for fire protection for nearly eight years, it now suits the purpose of the City of Dawson to discontinue the use of the water furnished by the Dawson Water Works Company under said contract, and build a system of water works of its own. Your orator charges that said city has already determined upon this course, and is now preparing to carry its purpose into effect without delay.

Your orator shows that by resolution of the City Council of

Dawson and election was called for December 12th, 1894, to determine whether or not the voters of the City of Dawson would authorize said city council to issue bonds in the sum of thirty-five thousand dollars to erect or buy water works or electric lights for the said City of Dawson, and the result of said election was by said city council declared to be in favor of issuing said bonds. Of said issue bonds amounting to ten thousand dollars, face value, were sold, and with the proceeds said city erected an electric light plant. The remainder of said bonds, amounting to twenty-five thousand dollars, face value, have not been sold. Your orator charges that it was not intended at the time of calling said election, to sell said bonds (except the ten thousand dollars aforesaid) at that time; but, it was the purpose of said city first to invoke a ruling of the Court, if practicable, as to whether the aforesaid contract with the Dawson Water Works Company was one that created a debt, so as to require the preliminary sanction of a popular
13 vote, and thereafter to sell said bonds, and with the proceeds of the sale, supplemented with such additional amount of money as might be raised by taxation, to erect a system of water works that would enable said city to dispense with the water supply and fire protection, which said city enjoys under its present contract. Your orator charges that it was the plan and purpose of the city council of Dawson that said city, while pretending to repudiate said contract, should nevertheless continue to possess and to use the water and fire protection afforded by said contract until such time as it should suit the convenience of said city to sell said bonds, and erect its own water works. Said purpose has been carried into effect with the consent and acquies-ence of the citizens of said City of Dawson. It has been known to every citizen of said city that though said city refused to pay, and pretended to repudiate said contract, said water was being used, and the full benefits thereof enjoyed, in accordance with said contract.

Your orator shows that on account of a recent decision of the Supreme Court of Georgia, construing the meaning of the term "debt," said City of Dawson has resolved and determined to sell said bonds as soon as practicable, and is now engaged in an effort to procure a sale therefor, for the purpose of erecting a system of water works, in violation of the aforesaid contract, and in total destruction of the contract rights of the Dawson Water Works Company, and the bondholders thereof; and in order to make it appear that said city has in truth and in fact repudiated said contract, and thereby lend the color of good faith to the sale of said bonds, said city is now threatening and preparing to discontinue the use of the

water now being furnished it by the Dawson Water Works Company, and as a temporary makeshift to repair some old cisterns, and employ a fire engine to lift water therefrom till such time as it can install the water works plant it proposes now to erect, and to own, and to operate.

XVIII. Your orator shows that in the proposed sale of said bonds, and incurring of fresh obligations, the City of Dawson does not contemplate, or expect to pay, or make any arrangement looking to the payment of the amount owing for water furnished it by the Dawson Water Works Company, and which it has already used the water of said company in putting out fires during the present year, 1899, and will therefore owe two thousand dollars for water used by it during the present year. To this is to be added the sum of eight thousand dollars, principal, for water used by said city during the years 1895, 1896, 1897 and 1898, together with interest thereon at seven
14 per cent. per annum from July 1st to January 1st, respectively, in each year, beginning with July 1st, 1895, on each semi-annual installment, and in addition thereto the balance due for the year 1894, retained under the guise of taxes, together with interest thereon; making owing for actual use of water, in the aggregate, principal and interest, about twelve thousand dollars. Said City of Dawson has wholly failed to levy an annual tax for the payment thereof, as by said contract it obliged itself to do. Sail city now proposes and threatens to incur a debt of twenty-five thousand dollars, in addition to ten thousand already incurred for erecting an electric light plant, and to pledge its revenues for the payment thereof, notwithstanding its obligation to lay its taxes, use its revenues, in meeting the payment of the aforesaid sum of twelve thousand dollars owing for water already furnished; to the total destruction of its ability to pay said last mentioned amount, and to the irreparable injury of bondholders.

XIX. Your orator shows that the aforesaid threatened wrongs and injuries, about to be committed by the said City of Dawson, will, unless immediately restrained and prevented, irreparably damage the holders of the bonds of the Dawson Water Works Company, whose rights and interest are in the keeping of your orator as trustee.

The Dawson Water Works Company has no property save and except its water works plant, and its aforesaid contract with the said City of Dawson. It has no revenues wherewith to meet the payment of its operating expenses, and interest on its bonds, save and except the rental of two thousand dollars stipulated to be paid by the City of Dawson for the water furnished, and to be furnished by said company for fire protection, and the revenues derived from the use of water by

private consumers. The latter is exhausted in operating expenses, and without the aforesaid rental to be paid by the city, said company would have no revenues wherewith to pay interest on its bonds, and bondholders would absolutely lose their interest. Without revenues sufficient to make said water works self-sustaining, said water works plant becomes valueless, save and except as its mains could be dug up, and sent off and sold elsewhere, and its machinery and materials sold or utilized in a dismantled condition, which could not be made to yield a sufficient amount to pay one-fourth of the said bonds.

Moreover, if said City of Dawson be permitted to erect and operate an opposition system of water works, the present water works company would not be in a position to compete successfully for the patronage of private consumers. The City of Dawson is not big enough to support two systems
15 of water works, involving two sets of mains, side by side, double pumping stations and stand pipes, a double investment, and a double set of operating expenses. One or the other system must necessarily give way to the other; and as the citizens would in their capacity as tax payers be compelled to make good all losses that might arise to the water works operated by the municipality, it would of course be to their interest to support that system by their patronage, thus leaving the private company practically without business.

XX. Your orator shows that the bonds of the said Dawson Water Works Company are held by numerous private owners; and that it is impracticable for them to take steps for their own protection. And your orator, therefore, has found it necessary as their trustee, to proceed in their interest, and apply to this Honorable Court to save the property which forms their security, and the contract which constitutes the only source from which they can derive interest on their bonds, and provide a fund for the payment of the bonds, and which alone gives to said water works plant its value from being totally lost. The Dawson Water Works Company has thus far been unable to collect from the City of Dawson the annual rental which said company has pledged, mortgaged and conveyed to your orator as trustee for bondholders, in order to secure the said bondholders the interest falling due on their bonds. In the present condition of the Dawson Water Works Company, and the attitude of the City of Dawson to said water works company, the said company in order to make good its bonds has consented to increase the sinking fund provided for originally, by permitting orator, as trustee as aforesaid, to put aside so much of the rentals that may be collected as, in orator's judgment, may be necessary for the full protection

of said bonds, and it has become necessary for your orator, as such trustee, to take charge of the collection of the rentals owing by the City of Dawson under the aforesaid contract of February 21st, 1890, and to demand of the said City of Dawson that said rentals be paid to your orator as trustee by said city, as by said contract with said city, and said deed of trust, your orator was entitled to do. The Dawson Water Works Company recognizing your orator's right to be paid the rentals due and to become due under said contract, and the necessity that exists for your orator to demand and receive said rentals in order to protect the rights entrusted and committed to your orator's care, has yielded to your orator's demand that your orator shall in future have the exclusive right to call upon said City of Dawson for the payment of all rentals accruing under said contract, including the rentals already due
16 for water furnished to said city during the years 1896, 1897 and 1898; and that payment therefor shall be made direct to your orator, trustee as aforesaid, and not otherwise. The said City of Dawson has been duly notified thereof, and your orator has duly demanded and requested of said City of Dawson that said rentals be paid to your orator as trustee for the bonds of the Dawson Water Works Company, and though thereunto demanded and requested, said City of Dawson has refused and hitherto wholly failed to pay said rentals, or any part thereof.

XXI. Your orator shows that said bonds were originally sold by the Dawson Water Works Company to the American Pipe Manufacturing Company, a corporation organized and doing business under the laws of the State of New Jersey, and having its principal place of business in the City of Philadelphia, State of Pennsylvania, in consideration that the said American Pipe Manufacturing Company had furnished the materials used in, and erected and constructed the water works system of said water works company, to be paid for by the issue and delivery to it of said bonds, as soon as said works should be completed. Shortly thereafter the said American Pipe Manufacturing Company sold all of said bonds, and the same are now owned by a number of different holders. The American Pipe Manufacturing Company being largely engaged in the construction of water works, and frequently receiving in payment for constructing such works, bonds of the companies for whom the same were constructed, has occasion frequently to negotiate and sell such bonds, and is interested in a commercial way in seeing that the interest falling due thereon is met, and the purchaser saved from loss. In addition to said company's desire to protect said bondholders, for commercial considerations said company was requested by the directors of the Dawson Water Works Company to pay the

interest as the same fell due, the said directors agreeing that the coupons representing the interest so paid should be held by said American Pipe Manufacturing Company as they were held by the owners thereof at the time of such payment, in order to save the property embraced in said trust deed from foreclosure sale, or sale of the property at public outcry by your orator as trustee, which is authorized on default in payment of interest, so as to preserve and save the stock held by it in said water works company. By reason whereof said American Pipe Manufacturing Company has heretofore paid to your orator as trustee for bondholders the interest falling due on the said bonds of the Dawson Water Works Company during the years 1896, 1897 and 1898, and on March 1st, 1899, the said water works possessing no means of paying
17 said interest by reason of the failure of the City of Dawson to pay the rentals pledged therefor. By reason whereof the said American Pipe Manufacturing Company became and is entitled to be subrogated to all the rights and remedies of the original holders of said interest coupons as the same existed while the said coupons were attached to and formed part of said bonds, and is entitled to the rights of bondholders in respect of calling upon your orator to demand and collect said rentals, and apply the same to the satisfaction of the claim and equity of subrogation of the said American Pipe Manufacturing Company.

Your orator shows that said Dawson Water Works Company is without money or means of paying to said American Pipe Manufacturing Company money advanced by said last mentioned company to pay interest on said bonds. In such condition of affairs, said American Pipe Manufacturing Company is unwilling to advance further sums, and has called upon your orator as trustee to demand and collect the aforesaid rentals from the City of Dawson for the purpose of enforcing its equity of subrogation, and enabling it to recover the sums advanced in paying interest to bondholders as aforesaid. And your orator prays, that if the moneys which may come into your orator's hands from said rentals should be more than sufficient to pay all the interest that may hereafter accrue on said bonds, and to create a proper sinking fund for the ultimate protection and payment of said bonds, your orator may have leave to apply and overplus remaining in his hands from the rentals of the years 1896, 1897 and 1898, to the reimbursing of the said American Pipe Manufacturing Company for the moneys paid by said company to your orator to meet interest on said bonds of the Dawson Water Works Com-

pany for the years for which said rentals are pledged by the aforesaid deed of trust.

XXII. Your orator, for and on behalf of bondholders and such other person or persons as may be entitled to its aid, as trustee, brings this its bill for injunction and relief such as may appropriately be afforded by a Court of equity.

Your orator shows that the acts and wrongs of the said City of Dawson, and its officers, agents and confederates are contrary to equity and good conscience, and tend manifestly and greatly to the damage, injury and utter ruin of the bondholders of the Dawson Water Works Company, and persons having the rights of bondholders, and that your orator, as well as those for whose use and benefit your orator sues as trustee, are utterly without remedy at law, and can only have adequate relief in a Court of equity where wrongs of that nature are properly relievable.

18 The acts already done have very greatly injured, and very seriously jeoparded the rights of bondholders, and unless the aforesaid threatened acts and wrongs are at once restrained and prevented, by the gracious interposition of a Court of equity, the properties, rights and benefits conveyed, and mortgaged by the aforesaid deed of trust or mortgage, will be destroyed, and rendered valueless, and the injury thereby sustained will be irreparable. The contract which alone insures to bondholders the payment of interest on their bonds will be wholly lost; the revenues from said water works property will be cut off and destroyed; the Dawson Water Works Company will no longer be able to pay operating expenses, or make needed repairs; the property of said company will be depreciated, and will prove wholly insufficient to pay off the aforesaid bonded indebtedness thereon; and bondholders will not only lose the interest, but will lose also a large part of the principal of their debt.

Wherefore, your orator, suing as trustee, humbly prays:

First: That the writ of injunction may issue directed to the City Council of Dawson, its mayor and aldermen, their officers, agents, confederates and abettors, restraining them or either of them, from erecting- constructing, or installing, or operating (or planning or proceeding so to do) any system of water works in or for the City of Dawson, or system of cisterns or other water supply for fire protection, or for furnishing the citizens or inhabitants of said city for domestic, sanitary, or other purposes, or from entering into any contract or arrangement with any person, firm or corporation (other than the existing contract with the Dawson Water Works Company), for the construction, lease, operation, or use of any system of water works, or for the supply of water for fire protection, or other municipal

purposes, or from laying mains, or other water works, or permitting the laying of pipes, or mains, or the construction of water works, in violation of the aforesaid contract, or the exclusive rights thereby given; or from selling or otherwise disposing of bonds, and in particular from selling or offering for sale, or disposing of, any of the bonds of the City of Dawson hereinbefore mentioned and described; or from paying out any moneys for water works, or from incurring any obligation for water works, or from entering upon or carrying out any contract for water works (save and except the aforesaid contract with the City of Dawson); or from refusing to carry out, or forbidding or preventing any person, organization, fire company, or agency, from carrying out the aforesaid contract with the Dawson Water Works Company, or from placing any obstacle
in the way of the due carrying out and performance and
19 fulfillment thereof according to its terms; or from ordering, directing, ordaining, or by corporate act or ordinance or otherwise causing, advising, counseling or procuring the fire department, fire companies, or other fire organizations, or individuals acting as a fire department or company, or using the city fire apparatus, to desist or refrain from the use of water furnished by the Dawson Water Works Company; or from levying, or enforcing the collection, of any city tax or license fee against the water works of the Dawson Water Works Company, stipulated to be paid in water, or by the furnishing of water as set forth in the contract, in violation of said contract with said waterworks company; or from doing any other acts of violation of the covenants, stipulations, terms and conditions of said contract.

Second: That the Court grant a temporary restraining order restraining the several things in the preceding prayer mentioned, until a hearing can be had; and that on the preliminary hearing a temporary injunction be also granted restraining said acts till a final decree can be had in said cause.

Third: That the aforesaid contract between the City of Dawson and the Dawson Water Works Company be decreed and declared to be valid, and mutually binding upon said City of Dawson and said water works company, and that said City of Dawson be decreed and adjudged to be estopped by its conduct from disputing the validity thereof.

Fourth: That said contract be specifically enforced, and that said City of Dawson be decreed, and compelled and required to specifically perform its contract, and perform all the covenants, stipulations and agreements therein contained; and in particular, to accept and use said water, and annually levy a tax upon the taxable property of said city sufficient to pay the same, and pay to your orator as trustee the sum of one thousand

dollars on the first day of January, and one thousand dollars on the first day of July, in each and every year for the full term of twenty years from the date when said water works were accepted by said city as hereinbefore set forth.

Fifth: That your orator be decreed and adjudged to have and recover of the said City of Dawson, in trust for the use and benefit of bondholders, and such person or persons as may be entitled to be subrogated to the rights and remedies of bondholders, and all persons entitled thereto as their interest may appear, the said sums of money due and owing by the said City of Dawson under its aforesaid contract for water furnished during each of the years 1896, 1897 and 1898, amounting to two thousand dollars for each of said years, together with interest thereon, from the several respective periods of maturity as hereinbefore set forth.

Sixth: That the Dawson Water Works Company may be made a party defendant for the purpose of binding it by the judgment and decree that may be rendered in this cause, and that the right and equity of subrogation, and all other rights and equities herein set up, may be enforced and decreed against said Dawson Water Works Company, and that said Dawson Water Works Company on its part may be held and decreed to specifically perform all of its obligations under said contract.

Seventh: That your Honors may grant unto your orator, and to those for whose benefit orator sues, such other and further, or other or further relief as to your Honors may seem meet and just in the premises.

Your orator expressly waives discovery and answer under oath, from each and all of the defendants herein named.

And may it please your Honors to grant, unto your orator, not only a writ of injunction conformable to the prayer of this bill, but also a writ of subpoena of the United States of America, directed to the said City of Dawson, W. B. Cheatham, J. G. Dean, J. S. Lowrey, Chas. Deubler, F. M. Jennings, N. Nasworthy, F. M. McNulty, A. J. Baldwin, Jno. Seay and the Dawson Water Works Company, commanding them on a day certain to appear and answer unto this bill of complaint, and to abide and perform such order and decree in the premises as to the Court shall seem proper and required by the principles of equity and good conscience.

HALL & WIMBERLY,
J. G. PARKS,
Solicitors for Complainant.

United States of America.

STATE OF PENNSYLVANIA,
County and City of Philadelphia.

On this 27th day of April, 1899, before me personally appeared Jno. K. Cuming, president of the Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Company, the complainant above named, who being by me duly sworn deposes and says that he is the president of the Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Company, and familiar with its business, and that he has read the foregoing bill of complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to matters
21 therein stated on information and belief, and as to those matters he believes it to be true.

JNO. K. CUMING,
President.

Sworn to and subscribed before me this 27th day of April, 1899.

[Seal of N. P.] JOS. A. COXE,
Notary Public.

STATE OF PENNSYLVANIA,
County of Philadelphia.

I, M. Russell Thayer, Prothonotary of the County of Philadelphia and Clerk of the Courts of Common Pleas of said county, which are courts of record, having a common seal, being the officer authorized by the laws of the State of Pennsylvania to make the following certificate, do certify, that Joseph A. Coxe, Esquire, before whom the annexed affidavit was made, was at the time of so doing a notary public for the Commonwealth of Pennsylvania, residing in the County of Philadelphia, duly commissioned and qualified to administer oaths and affirmations and to take acknowledgements and proofs of deeds or conveyances for lands, tenements and hereditaments in said State of Pennsylvania, and to all whose acts, as such, full faith and credit are and ought to be given, as well in Courts of Judicature as elsewhere; and that I am well acquainted with the handwriting of the said notary public, and verily believe his signature thereto is genuine, and that said oath or affirmation purports to be taken in all respects as required by the laws of the State of Pennsylvania.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, this 27th day of April, in the year

of our Lord one thousand eight hundred and ninety-nine. (1899).

M. RUSSELL THAYER,
[Seal Court of Common Pleas.] *Prothonotary.*
(I. R. Stamp 10c.)

"Exhibit A."

This indenture, made the 1st day of September, Anno Domini, one thousand, eight hundred and ninety-one, between the Dawson Water Works Company, a corporation of the State of Georgia, party of the first part, and the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, a corporation of the State of Pennsylvania, party of the second part:

Witnesseth that whereas, on the 17th day of August, Anno Domini, one thousand eight hundred and ninety-one, the following resolution was adopted at a meeting of the stock-
22 holders of the Dawson Water Works Company, aforesaid, and all of the stockholders of said company consenting thereto:

"Resolved, That the Board of Directors be and are hereby "authorized to prepare and execute and to issue and sell for the "purpose of this company, eighty (80) first mortgage bonds of "five hundred dollars ($500) each, numbered from one to eighty "inclusive. Said bonds to be dated September 1st, 1891, and "payable in lawful money of the United States on the first day "of September, 1916, bearing interest at the rate of 6% per "annum, payable on the first day of March and September in "each year, said bonds amounting in the aggregate to forty "thousand dollars ($40,000), to be secured by a deed of trust "by way of a mortgage of all the property, real and personal, "franchises, privileges, rights and liberties now owned or here-"after to be acquired by the Dawson Water Works Company. "The yearly rental which the City of Dawson, Georgia, binds "itself to pay in accordance with the terms of the franchise "granted by the said city, February 21st 1890, amounting in "the aggregate to $2000 per annum, payable semi-annually, "and paid into the hands of the trustee of the mortgage bonds "for interest purposes on said bonds, and in case the City of "Dawson contracts to increase the number of fire hydrants. "The income or yearly rental shall also be paid into the trustee's "hands for said purpose of paying interest upon the first mort-"gage bonds, and should there be any money received by the "trustee from said sources in excess of the amount required to "meet interest on the bonds, such excess shall be returned to the "treasurer of the Dawson Water Works Company."

Now this indenture witnesseth, That the Dawson Water

Works Company, aforesaid, as well in consideration of the premises and the better securing the payment of the above described bonds, and the interest which will accrue threon, as of the sum of one dollar unto them well and truly paid by the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company aforesaid, at the time of the execution hereof, the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released and confirmed, and by these presents do grant, bargain, sell, alien, release and confirm unto the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, aforesaid, and their successors, all the real estate and personal property, corporate rights and franchises, privileges and appurtenances of the Dawson Waterworks Company, aforesaid.

Together with all and singular the improvements and structures, machinery, dams, reservoirs, pipes, water courses, rights, easements, liberties, privileges, hereditaments, and appur-
23 tenances whatsoever unto the hereby granted premises belonging or in otherwise appertaining, and the revisions, remainder, rents, income, earnings, issues and profits thereof; and together with all other property and franchises of every kind and description of the Dawson Water Works Company aforesaid, that may be hereafter owned and acquired by them; and together with any and all income now or hereafter payable to the said the Dawson Waterworks Company under any agreement made between the said company and the City of Dawson, Georgia, aforesaid, or payable under any ordinance of the said city; and also any and all income now or hereafter payable to the said company under any agreements that may be made between it and any other corporation, individuals or partnerships.

To have and to hold, receive and take, all and singlar the real and personal estate, premises, hereditaments, corporate rights, franchises, privileges and appurtenances hereby granted unto the Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Company, aforesaid, and their successors to and for their only proper use and behoof.

But in trust nevertheless, for the use, benefit and security of the person or persons, body or bodies, politic or corporate, who shall become holders of the said bonds, or any of them, issued as aforesaid by the said the Dawson Water Works Company.

And it is expressly understood and agreed that if default be made in the payment of the interest on the bonds herein referred to and secured by this mortgage, for six months after the time appointed for the payment of said interest, or if the Dawson Water Works Company shall fail at any time to pay taxes that shall be assessed upon the property hereby mortgaged for a period of six months after the same shall have been assessed, in

either event the principal sum of said bonds shall at the option of the Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Company, aforesaid, become due and payable, as if the time appointed for the payment thereof had actually arrived, and in either such event, or in the event of the said bonds not being paid at maturity the Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Company, aforesaid, trustees, or their successors in the trust, shall forthwith commence proceedings at law or in equity for the recovery of the principal sum due with interest, and together with an additional sum not to exceed five per centum upon the principal sum hereby secured, which shall be recoverable by way of a reasonable compensation to the said trustee and for expenses of counsel and otherwise in this trust, or may with or without entry, and shall upon the written request of the holders of one-half in value of
24 the bonds hereby secured, cause all and singular the premises, appurtenances, property and franchises of every description hereby conveyed to be sold as an entirety at public sale, to the highest and best bidder in the City of Dawson, Georgia, aforesaid, after giving at least sixty days notice of the time, place, and terms of such sale by advertisement once a week in newspapers of general circulation in the City of Dawson, Georgia, aforesaid, and in the City of Philadelphia, in the State of Pennsylvania, and upon such sale being made, the trustee for the time being shall make, execute and deliver unto the purchaser thereof a good and sufficient deed in fee simple, conveying and assigning the property so sold, and such conveyance shall be a perpetual bar in law and equity against the Dawson Water Works Company aforesaid, its successors and assigns, and against all persons claiming or to claim under it or them, of all right, title, interest or claim of, in and to the said property and franchises or any part thereof, and in the event of such legal proceedings or sale, the trustee for the time being, after deducting from the proceeds the costs and expenses thereof, and such reasonable compensation to the trustee, and its attorneys and agents for services in connection therewith, not exceeding the amount above specified, shall apply so much of the proceeds thereof as may be necessary to the ratable payment of the said principal sum and the interest then due thereon, and if any proceeds shall remain in its hands after the full payment of the said principal sum and the accrued interest, then it shall pay over the same to the party of the first part thereto, its successors and assigns; and in the event of said trust becoming vacant from any cause whatsoever. The Dawson Water Works Company aforesaid, shall have full power and authority to nominate and appoint a new trustee for the purpose of filling the vacancy, and in the event of the failure of The Dawson Water Works Company, aforesaid, for thirty days after such trust shall have

become vacant to appoint a new trustee as aforesaid, such appointment may be made by the proper judicial authority of the said State of Georgia, upon application of holders of the bonds hereby secured to the value of not less than five thousand dollars, and upon such appointment being made and accepted, the substituted trustee shall, without further act or deed, become vested with all and singular the estate, rights, powers, and perform all the duties of trustee in like manner and with the same effect as if a party of these presents.

And the said Dawson Water Works Company hereby covenants and agrees that it will on the first day of September, 1901, and annually thereafter, whenever any of said
25 bonds can be purchased at not exceeding their par value, apply and appropriate out of the net earnings of the year previous and annually thereafter on the last day of the month of August when sufficient therefor, a sum equal to one and one-quarter per cent. upon all of the bonds that may have been issued under this mortgage to the purchase of such bonds as aforesaid, and when so purchased, cancel the same; but, if the said bonds cannot be purchased at or under the price aforesaid, then the said trustee for the time being shall invest the moneys composing said sinking fund in such lawful securities as may be deemed advisable, the proceeds whereof, together with the accumulation of interest thereon shall belong to the said sinking fund, and be applied to the purchase of the said bonds as aforesaid whenever the same can be purchased at or under the price hereinbefore named.

And the said the Dawson Water Works Company hereby covenants and agrees it will on demand from time to time hereafter execute, acknowledge and deliver to the said The Columbia Avenue Sinking Fund, Safe Deposit, Title and Trust Company, trustees as aforesaid, and its successors, or to the trustees for the time being, any and all such further conveyances and assurances as may be necessary and proper fully to convey to and vest in The Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Company, trustee as aforesaid, and its successors, or the trustees for the time being, all future acquired real and personal estate, equipment and property, right and franchises it may hereafter purchase and take for the purpose of carrying on its business.

Provided always nevertheless, that if the Dawson Water Works Company, aforesaid, shall well and truly pay or cause to be paid unto the person or persons, body or bodies politic or corporate, who shall become holders of the bonds issued as aforesaid, the principal of said bonds with the interest as therein stipulated, without fraud or further delay, and without any deduction, defalcation or abatement for taxes or otherwise, then and from thenceforth as well this present indenture and estate

hereby granted as the said bond shall cease, determine and become void, anything herein contained to the contrary notwithstanding, and the said trustee or its successors shall forthwith cause satisfaction to be entered upon the record hereof.

In testimony whereof, the said the Dawson Water Works Company has caused its corporate seal to be hereto affixed, and these presents to be subscribed by its president and secretary the day and year first above written.

[SEAL] THE DAWSON WATER WORKS COMPANY,
By J. W. HAWLEY,
President.
H. BAYARD HODGE,
Secretary.

Attest: Sealed and delivered in the presnce of:
WILLIAM PEROT, Jr.,
JOS. S. KEEN, Jr.

The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, the trustee named in the foregoing indenture, doth hereby accept the trust thereby created, upon the terms and conditions therein set forth.

Witness the corporate seal of the said company, duly attested this nineteenth day of September, A. D. 1891.

[SEAL] By JNO. K. CUMING,
President.

Attest:
WALTER SCOTT,
Secretary.

STATE OF PENNSYLVANIA, } ss:
County of Philadelphia, }

Be it remembered, that on the 1st day of September, A. D. 1891, before me a commissioner for the State of Georgia, within and for the county and state aforesaid, personally came H. Bayard Hodge who being duly affirmed according to law, deposed and said that he was personally present and saw the common or corporate seal of the Dawson Water Works Company affixed to the foregoing indenture; that the seal so affixed is the common or corporate seal of said company, and was so affixed by the authority thereof; that J. W. Hayley is the president of said company, and did sign the said indenture as such in the presence of said deponent; that said deponent is the secretary of the said company; and that the name of said deponent subscribed to the foregoing indenture is attestation of the due execution thereof, and the name of the said president, are of their own proper and respective handwriting.

H. BAYARD HODGE.

Sworn and subscribed before me, the day and year first above written.

Witness my hand and official seal:

[SEAL] SAMUEL L. TAYLOR,
(*Commissioner of Deeds for Georgia.*)

The Dawson Water Works Company upon receiving notification this day from the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, trustee for the holders of the bonds of this company, as follows, to-wit:

27 "To the Dawson Water Works Company:

Under the contract made between the City of Dawson and the Dawson Water Works Company on the 21st day of February, 1890, the undersigned, trustee for the holders of the bonds issued by your company, is authorized to collect all amounts due by the City of Dawson under said contract for water rentals."

"This is to give you notice that this company, as such trustee, will claim and exercise the exclusive right to collect all amounts due by said City of Dawson for water rentals since the beginning of the year 1896, and all amounts that may hereafter become due."

Passed in reply thereto the following resolutions:

Be it resolved, first—That this company recognizes the legal right of the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, trustee for the holders of the bonds of this company, to demand, receive and collect from the City of Dawson any and all sums of money that may be now due, or that may hereafter become due under the aforesaid contract.

Second: That the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, trustee for the holders of the bonds of this company, may, after paying the interest on said bonds, apply the proceeds or such portion thereof as such trustee may deem necessary, for the purpose of a sinking fund for the ultimate paying of said bonds.

To the Dawson Water Works Company:

Under the contract made between the City of Dawson and the Dawson Water Works Company on the 21st day of February, 1890, the undersigned, trustee for the holders of the bonds issued by your company, is authorized to collect all amounts due by the City of Dawson under said contract for water rentals.

This is to give you notice that this company, as such trustee, will claim and exercise the exclusive right to collect all amounts due by said City of Dawson for water rentals since the beginning of the year 1896, and all amounts that may hereafter become due.

To the City of Dawson, Georgia, and the Mayor and Council of said City:

By virtue of the provisions of the contract contained in an ordinance passed by the City of Dawson on the 21st day of February, 1890, under which the Dawson Water Works Company has furnished, and is furnishing, water to said City of Dawson for fire protection we hereby notify you to pay the hydrant rentals due under said contract for water furnished for fire protection for the years 1896, 1897 and 1898, and amounting in the aggregate to the sum of six thousand dollars, besides interest for each of said years to the undersigned as trustee for the holders of the bonds of the Dawson Water Works Company.

28

You are also notified that in future all hydrant rentals as they become due under the aforesaid contract contained in the ordinance dated February 21st, 1890, must be paid to the undersigned trustee, and not to the Dawson Water Works Company.

"Exhibit B."

Article X. Chapter XXIII.

Water Works Contract.

Sec. 231. The City Council of the City of Dawson, Georgia, do hereby grant to R. L. Bennett, of Philadelphia, Pennsylvania, and his associates, their successors and assigns, who are to organize, a company to be styled "The Dawson Water Works Company," the exclusive right and privilege for a period of ninety-nine years, of constructing, maintaining and operating a system of water works for the purpose of supplying said city and its inhabitants with water for protection against fire, and for domestic, sanitary and other purposes.

Sec. 232. The said company, for the purpose of constructing, maintaining, operating, extending and repairing said system of water works, shall have the sole and exclusive privilege, and full power, right and authority to lay water pipes and mains along any or all streets and avenues of said city, as the same are now open, or may hereafter be extended, and to that end shall have full right to dig ditches or trenches in the streets of said city of such depth and of such width as may be necessary. Provided, that the city shall not be responsible for any damage occasioned thereby, and that the streets shall not be unreasonably obstructed by such work.

Sec. 233. The said company shall have the right to erect buildings and tanks, lay pipes and erect any other structures,

or make any other improvements which may be necessary for its purpose, on any or all lands owned or controlled by said city, except its public squares.

Sec. 234. The said company and their successors and assigns shall complete and have in operation, within eighteen months from the date of the passage of this ordinance, a complete and thorough system of water works, laying four and eight-tenths (4 and 8-10) miles of pipe, size eight, six and four inches in diameter, with a reservoir of not less than
29 forty thousand gallons capacity, and of sufficient height to produce a pressure on the mains such that from any hydrant located on principal streets a stream of water will be projected, fifty feet vertically, in still air, through one hundred feet of fire hose, with a- one-inch nozzle attached.

The said company, and their successors and assigns, shall be, and are required, from the completion of their system of water works till their charter shall cease, to furnish a sufficient supply of water for the purposes before and hereafter mentioned, unless prevented by unavoidable and providential causes. In such event they shall be allowed a reasonable time to make repairs, and if, after such reasonable time has been allowed, they should still fail to furnish said supply of water, their franchise from that fact be forfeited.

Sec. 235. The said company shall extend its mains and pipes, enlarge its plant, and generally enlarge its system, from time to time, to meet increasing demands consequent upon the growth of the city.

Sec. 236. The City of Dawson, in consideration of said company guaranteeing to it, for the period of twenty years, and as long thereafter as the said company, its successors and assigns, shall continue to operate water works, a free and unrestricted use of its water, in case of fire, and for protection against conflagration, and agreeing to establish at convenient places along the line of its mains, fire plugs of approved pattern, not to exceed fifty in all, until the corporate limits of said city are extended and the population of said city increases so that there are five hundred persons living in said extension, after which they shall be increased proportionately if required. And, as an additional fire protection, also to furnish water to fill the present public cisterns if needed, the said water to be used exclusively for fire purposes only, and the said water to remain the property of the said company except in case of fire, hereby obligates itself to pay to the said company, or to such trust company as the Dawson Water Works may elect, or decide upon as their trustees for their bonds, the sum of two thousand dollars annually for twenty years, in

semi-annual payments of one thousand dollars each, on the first day of January and July of each year.

The first payment to be made on such of said days as occur after the completion of said works as provided in Section 234 of this ordinance; and, in case said city shall not have sufficient funds at any of such times to make said payments, or, for any cause, does not pay said money at times fixed as aforesaid, then, in that case warrants shall be issued on the city treasurer, in favor of said company, for the amount due.

30 Sec. 237. The council shall, and they are hereby required, to make provision each year, for the payment of two thousand dollars as provided in the foregoing section, by levying a tax, sufficient for that purpose, upon the taxable property of the city.

Sec. 238. Said company, its successors and assigns, shall have the right to make reasonable rates and regulations for the government of private consumers in the use of its water; and to charge such rates for its use as it may from time to time establish. Provided, the rates charged per annum shall not exceed those named in the following schedule:

Dwelling, single piggots, for domestic use only		$12.00
Bath tub in addition		8.00
Water closets		8.00
Wash basins		4.00
Urinals		4.00
Yard sprinklers, with fifty feet of hose and ¼ of inch nozzle, in use not more than two hours per day		12.00
Academies and schools, double rates		
Boarding houses, double private rates		24.00
Barrooms		24.00
Barroom and restaurant		36.00
Bakeries and barber shops		24.00
Druggist, with soda fountains		24.00
Fountains	$12.00 to	50.00
Livery stables	$25.00 to	50.00
Offices, single rooms		6.00
Photograph galleries		24.00
Store, same as dwellings per fixture. Steam engines, per horse power		5.00
Hotels, mills, manufacturies and other large consumers, by metre or private rates. Metre rates, per 100 cubic feet		.25
Building, laying brick, per thousand		.10
Plastering per hundred yards		.50

Sec. 239. That in consideration of the said company agreeing to furnish water to the public municipal buildings, and further agreeing to furnish water to two public fountains of ½-inch nozzle each, the City of Dawson hereby obligates itself to remit to said company, its successors and assigns, any and all license, fees, taxes, dues and charges which may at any time hereafter be levied on, assessed by said city against said company, or upon the plant to be used in said water works system.

31 Sec. 240. That full assent is hereby given to a charter to be granted by the Legislature of the State of Georgia, to the said R. L. Bennett and associates, their successors and assigns, or to be obtained by them, under the general incorporation laws of said state incorporating them, into a body corporate, under the title of the Dawson Water Works Co. and granting to said company the exclusive right to contract, tract, maintain and operate a system of water works in said City of Dawson, for the purpose of supplying said city, its inhabitants, citizens, residents, with water for protection against fire, and for domestic, sanitary and other useful purposes, and to make such reasonable rates and regulations for the government of private consumers in the price of water, and to charge such rates therefor as the said company may determine upon. Provided, the rates do not exceed those established by this ordinance.

Sec. 241. The provisions of this ordinance shall be mutually binding upon the City of Dawson and R. L. Bennett and associates, and the company to be organized by them, in pursuance of the provisions thereof, and it shall have the force and effect of a contract between the respective parties as fully and completely as if it were drawn in that form and signed by the contracting parties.

Confirmed at regular meeting City Council of Dawson, February 21st, 1890.

In the Circuit Court of the United States for the Northern

District of Georgia, Western Division.

THE COLUMBIA AVE. SAVING FUND, SAFE Deposit, Title and Trust Company.
vs.
CITY OF DAWSON, *et al.* } Equity. No. 44.

At Chambers, Atlanta, Ga., April 29, 1899.

Read and considered. Let this bill be filed; let the defendants show cause before me at the U. S. Circuit Court room at Atlanta, on Saturday, May 20th, 1899, at 10 o'clock A. M.,

why an injunction should not issue as prayed. In the meantime and until the further order of the Court, the defendants are each and all restrained as prayed in said bill.

If defts. meet the bill by answer or affidavits let the same be filed on or before the 13th of May, and let reply affidavits
32 be filed on or before the 18th of May, unless time extended by the Court or agreement of parties.

WM. T. NEWMAN,
U. S. Judge.

Filed in clerk's office May 1st, 1899.

O. C. FULLER,
Clerk,
By N. A. BROWN,
Deputy.

Subpoena.

United States of America, Western Division of the Northern District of Georgia.

THE COLUMBIA AVENUE SAVING FUND, Safe Deposit, Title and Trust Company, Complainant,
and
CITY OF DAWSON, *and others*, Defendants. } In Equity. No. 44.

The President of the United States: To City of Dawson, W. B. Cheatham, J. G. Dean, J. S. Lowrey, Chas. Deubler, F. M. Jennings, F. Nasworthy, F. M. Mc Nulty, A. J. Baldwin, John Seay, Dawson Water Works Company.

For certain causes offered before the Judges of the Circuit Court of the United States, for the Western Division of the Northern District of Georgia, in equity, you and each of you, are hereby commanded and strictly enjoined, that, laying all other matters aside, and notwithstanding any other excuse, you personally be and appear at the Clerk's office of the said Court, in the City of Columbus, at rules to be had on the first Monday in June, 1899, next, to answer to those things which shall then and there be objected to you by bill of complaint of the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, and to do further, and to receive what the said Court shall have considered in this behalf, and this you may in no wise omit, under penalty of five hundred dollars; and have here this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 1 day of May, in

the year of our Lord one thousand eight hundred and ninety-nine.

[Seal C. C.]

O. C. FULLER,
Clerk,
By N. A. BROWN,
Deputy.

Memorandum.—The defendants are required to enter their appearance in the suit above stated, in the Clerk's office, on or before the day at which this writ of subpoena is returnable, otherwise the bill may be taken pro confesso.

33

O. C. FULLER,
Clerk,
By N. A. BROWN,
Deputy.

Marshal's Return.

I hereby certify that I have this day served the City of Dawson with a copy of the within writ by handing W. B. Cheatham, mayor of the City of Dawson, a copy of same personally, at Dawson, Terrell County, Ga. I further certify that I have this day served W. B. Cheatham a copy of this writ by handing W. B. Cheatham with a copy of same personally, at Dawson, Terrell County, Ga. I further certify that I have this day served J. G. Dean, J. S. Lowrey, Chas. Doubler, F. M. Jennings, F. Nasworthy, F. M. McNulty, A. J. Baldwin and John Seay, with a copy of this writ by handing each a copy of same personally, at Dawson, Terrell County, Ga. I also certify that I have this day served the Dawson Water Works Company with a copy of the within writ by handing J. A. Horsley, superintendent of Dawson Water Works Company, a copy of said writ personally, at Dawson, Terrell County, Georgia.

This the 3rd of May, 1899.

The return of W. H. JOHNSON,
U. S. Marshal,
By C. D. WILLIAMS, Jr.,
Deputy U. S. Marshal.

Filing: Returned into Clerk's office, and filed 17 May, 1899.

O. C.FULLER,
Clerk,
By N. A. BROWN,
Deputy.

34 *Marshal's Return.*

I hereby certify that I have served the within writ by leaving a copy of the same with W. B. Cheatham, Mayor of Dawson, Ga. This May 3rd, 1899.

W. H. JOHNSON,
U. S. Marshal.
By C. D. WILLIAMS, Jr.,
Deputy.

Filing: Returned and filed in Clerk's office 15 day of May, 1899.

O. C. FULLER,
Clerk,
By N. A. BROWN,
Deputy.

35 *Appearance of Counsel.*

United States, Fifth Circuit, Northern District of Georgia.

THE COLUMBIA AVENUE SAVING FUND, Safe Deposit, Title & Trust Co., Complainant,
vs.
CITY OF DAWSON, *et al.*
} In Equity. No. 44.

Without waiver of any objection to the jurisdiction of the Court, or of any other right whatsoever, the Clerk of this Court will please enter our appearance as solicitors for the defendants in the above entitled cause, except the defendant the Dawson Water Works Company.

J. M. GRIGGS,
J. A. LAING,
H. A. WILKINSON,
GUERRY & HALL,
Solicitors for the City of Dawson and others.

On filing precepts in this cause, and on motion of solicitors above named, ordered that the appearance of solicitors for defendants herein be, and the same hereby is entered, and that the cause will now be docketed for said defendant.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 5 day of June, A. D. 1899.

O. C. FULLER,
Clerk,
By N. A. BROWN,
Deputy.

Filing: Filed and entered this 5 day of June, 1899.
O. C. FULLER,
Clerk,
By N. A. BROWN,
Deputy.

36 *Answer of A. J. Baldwin.*

In the Circuit Court of the United States for the Western Division of the Northern District of Georgia.

THE COLUMBIA AVENUE SAVING FUND, Safe Deposit, Title & Trust Co. *vs.* CITY OF DAWSON, *et al.* } In Equity. No. 44.

For cause why the injunction prayed for in the above cause should not be issued against him, and without waiver of objection to the jurisdiction of the Court, the defendant, Andrew J. Baldwin, says, that he denies all the allegations in said bill of any wrong doing and wrong intention on his part. He further says that since the fall of 1896 he has not been mayor of said City of Dawson, or held any other office of said city, or of any character whatever. That since then he has been and is now a private citizen, and he respectfully submits that he has been improperly joined as defendant in said suit.

A. J. BALDWIN.

GEORGIA,
Terrell County.

In person appears before me Andrew J. Baldwin, who, on oath, deposes and says that the allegations contained in the foregoing answer are true.

Sworn to and subscribed before me this the 22 day of May, 1899.

[Seal of N. P.] GEO. B. ANDREWS,
Notary Public, Terrell County, Georgia.

Filing: Filed in Clerk's office 9 day of June, 1899.
O. C. FULLER,
Clerk.

37 *Amendment to Bill of Complaint.*

In the Circuit Court of the United States for the Western Division of the Northern District of Georgia.

THE COLUMBIA AVENUE SAVING FUND, Safe Deposit, Title & Trust Company
vs.
CITY OF DAWSON, *et al.*
} In Equity. No. 44.

Amendment to the above stated bill of complaint.

Said amendment consisting of paragraphs XXIII, XXIV and XXV, of said bill as amended, and being inserted in said bill immediately at the end of the 22nd paragraph of the bill as oriignally filed, and immediately preceding the prayers of said original bill.

XXIII. Your orator shows that notwithstanding the validity of the aforesaid contract contained in the aforesaid ordinance of February 21st, 1890, and notwithstanding the fact that the bonds were marketed on the faith of said contract, and the waterworks were erected at great expense, and the Water Works Company complied with the terms and conditions of the contract, the said city of Dawson has by its ordinances and conduct, attempted to impair the obligation of said contract, and has thereby greatly diminished and largely destroyed the value of the property of said Water Works Company, which constitutes the security possessed by the bondholders, and has deprived bondholders of the rentals which were to be paid by said city under said contract, and said action and threatened action of said city are in fraud and destruction of the rights of bondholders, and your orator as their trustee, under said contract with the city, and the protection guaranteed under the Constitution of the United States.

The aforesaid ordinance passed by said City Council of Dawson on June 27th, 1894, whereby said city undertook to repudiate said contract, was an attempt on the part of said City of Dawson to impair the obligation of said contract in violation of the Constitution of the United States, and the protection thereby guaranteed to private rights.

The said city has also passed other ordinances, and done acts in attempted impairment of said contract, namely: The ordinance passed by said City of Dawson on October 4th, 1894, ordering an election for the purpose of determining whether two-thirds of the qualified voters of said city should by their assent authorize said city to issue $35,000.00 of 6% bonds, for the

purpose of buying or erecting a system of waterworks,
38 and an electric light plant for said city, and the ordinance passed by said City of Dawson on November 5th, 1894, on the same subject and to the like effect, and the holding of the election on December 12th, 1894, pursuant to the provisions of said two last mentioned ordinances, and the carrying of said proposition by the requisite two-thirds of the qualified voters of said city, and the ordinance passed by said City of Dawson on the 13th day of December, 1894, whereby the result of said election was declared to be in favor of the issue and sale of bonds for said purposes, as well as the subsequent conduct of the said city in giving effect to said ordinances by refusing to pay the water rentals stipulated in said contract, or to levy a tax for the purpose as required by the contract, and by claiming that it was no longer bound by said contract. All of said ordinances and acts are an effort and attempt on the part of said City of Dawson to impair the obligations of said contract under color of a claim of authority from the Constitution and Laws of the State of Georgia, in violation and attempted impairment of the protection guaranteed to said contract under the Constitution of the United States.

The City of Dawson, in further attempted violation of the obligation of said contract, contrary to the provision of the Constitution of the United States that no state shall pass any law impairing the obligation of contracts, under color of the authority given it by its charter to make and adopt all ordinances, by-laws, rules and regulations, necessary or proper for the security, welfare, convenience and interests of said city and its inhabitants, and for preserving the health, morals, peace, order and good government of the same, not only adopted the aforesaid ordinances, but recently, and at the time when temporarily restrained by this Honorable Court, was proceeding to carry into effect said ordinances, and the said election, as hereinbefore set forth.

All of which wrongs, and threatened wrongs, are contrary to equity and good conscience, and are irreparable, and can only be relieved against and prevented by the gracious interposition of a Court of Equity.

Your orator shows that the present suit arises under the Constitution and Laws of the United States, and your orator invokes the jurisdiction of the Circuit Court of the United States, in order to set up and enforce the protection guaranteed by the Constitution of the United States to contract rights, and to defeat and prevent the effort of said city to impair the obligation of the aforesaid contract.

XXIV. Your orator further shows that the wrongful conduct of the City of Dawson, in refusing to pay for said

39 water, or to levy said taxes, or to be further bound by the obligation of said contract, and to destroy without compensation property values and rights dependent upon the exclusive franchise, rentals and revenues guaranteed by said contract, and the wrongful, threatened conduct of said city in proceeding to erect and operate a rival system of waterworks for fire protection, and for supplying the inhabitants with water, in violation of said contract, is in attempt to, and unless restrained and prevented, will have the effect of depriving the bondholders of said waterworks company, and your orator as their trustee, as well as said waterworks company, of their property without due process of law, contrary to the protection guaranteed by the Constitution of the United States. Your orator submits that said city is not permitted by the Constitution of the United States to thus legislate said waterworks company and the holders of its bonds, and their trustee, out of their vested contract and property rights, without compensation.

XXV. Your orator shows that the Dawson Waterworks Company, after a decision rendered by the Supreme Court of Georgia, in March, of this present year, in a case wherein the said Dawson Waterworks Company was the plaintiff, and the City of Dawson was the defendant notified your orator that it would take no steps to collect the rentals falling due on said contract for fire protection furnished from and after January 1st, 1896, and said company since said time hitherto has wholly declined and refused, and still declines and refuses to take any steps in the Courts looking to the enforcement of said contract, and the protection of the contract and property rights which constitute the sole protection and security possessed by bondholders, and your orator as their trustee.

Said waterworks company informed your orator, and your orator has ascertained the fact to be, that said waterworks company was without means to pay further installments of interest as they should fall due, and had no revenue with which to pay interest, and that in the present condition of said waterworks company, it was not able to borrow money to pay interest in future.

Your orator is informed and charges the fact to be that, prior to said decision rendered last March, the Dawson Waterworks Company had already planned and arranged to make extensive repairs and improvements of its plant, which would very materially better the service and increase the water pressure and height and strength of fire streams afforded by said system; but in its present financial condition, with its revenues cut off, and its very existence threatened by the proposed opposition system, said waterworks company is not in a condition to

40 float betterment bonds, or borrow money to make said proposed improvements and repairs, and has withdrawn the contract for the making of the same. Your orator never heard of any complaints as to said waterworks, or the character of the service, until the filing of the defense in this present case, and from an investigation is led to believe that if any cause for just complaint exists it exists very slightly, and in the present unfortunate attitude of said city has been greatly and unjustly exaggerated. Yet your orator recognizes that said complaints, even though unfounded, work great financial injury to the revenues of said company, and its property, and your orator recognizes that while repairs are perhaps not urgently needed at this time, yet it will be necessary in future to make repairs and extensions in said system from time to time during the lifetime of said contract. The said waterworks company cannot, in the present condition of affairs, make such repairs and improvements; unless the same are made as they become necessary, the bondholders will lose revenues as well as the property which constitutes their security.

Your orator prays that this Honorable Court will direct that the rentals owing by said City of Dawson may be paid out, as they are collected, in making such repairs, betterments and extensions of said system, as the due protection of the rights and interests of bondholders may require, and that if need be, certificates of indebtedness against said plant and its revenues be authorized by this Honorable Court so as to make such repairs and improvements as may be necessary before said rentals can be collected, and that the Dawson Waterworks Company be required on its part to specifically perform all its obligations under said contract, and continue to furnish such service as the contract calls for, and that the benefit of said contract may be preserved, and that thereby the rights of bondholders may be protected and saved.

J. G. PARKS,
HALL & WIMBERLY,
Solicitors and Counsel for Complainant.

UNITED STATES OF AMERICA,
Northern District of Georgia, } *ss*:

In person appeared Olin J. Wimberly, one of the solicitors for the complainant in the above stated bill, who being duly sworn deposes and says on oath that the facts stated in the foregoing amendment are true, except as to such matters as are therein stated on information and belief, and as to all excepted matters he believes the same to be true.

OLIN J. WIMBERLY.

Sworn to and subscribed before me this 27th day of June, 1899.

GEO. S. BARNARD,
Deputy Clerk, U. S. Cir. Ct.

41 Leave granted June 26, 1899.

DON A. PARDEE,
Circuit Judge.

Filing: Filed in clerk's office 25 day of Aug., 1899.

O. C. FULLER,
Clerk,
By N. A. BROWN,
Deputy.

Objection to the Jurisdiction, and Answer of Defendants.

In the Circuit Court of the United States for the Western Division of the Northern District of Georgia.

THE COLUMBIA AVENUE SAVING FUND, Safe Deposit, Title and Trust Co.
vs.
CITY OF DAWSON, *and Others.*
} In Equity. No. 44.

Showing for Cause.

And now comes the City of Dawson, the City Counsel of Dawson and W. B. Cheatham, Mayor, and J. C. Dean, J. S. Lowrey, Chas. Deubler, F. M. Jennings, F. Nasworthy
42 and F. M. McNulty, Aldermen, and John Seay, City Marshal of the City of Dawson, and without waiver of any objection to the jurisdiction of the Honorable Court, or of any right of demurrer, plea or answer, or of any other right whatsoever, and for cause why an injunction should not issue as prayed, say:

1st. They object to the jurisdiction of the Court, and for grounds of objection, say:

1. That the alleged defendant, the Dawson Waterworks Company, which is a corporation created and organized under the law of Georgia and resident therein now and at the time of the filing of said bill, namely, in said City of Dawson and County of Terrell, was and is the real complainant, and that the action of the said defendant and of the alleged complainant set forth and exhibited to said bill was and is fraudulent and collusive, and was had during the month of April last and since the judgment of the Supreme Court of Georgia in the

cause of the City Council of Dawson *vs.* the said, The Dawson Waterworks Company, was rendered, on said alleged contract declaring the same void, which judgment, together with the record in said case is hereafter more fully and specifically plead, in order to obtain jurisdiction in this Honorable Court in a new name and under an alleged new created right of action, which does not exist except to the extent created as above stated, and for the purpose of avoiding the said judgment of the Supreme Court, which is final and conclusive of all the questions decided in that case and all the questions now made by said bill in this case.

2. The Court has no jurisdiction of said bill, assuming all the allegations therein to be true, all of which allegations, so far as the same are material, are here and now denied.

Wherefore, these defendants pray the Court to proceed no further in the cause, but to dismiss said bill for want of jurisdiction.

And for further cause why the injunction prayed for should not issue, the defendants say:

1st. That there is no equity in said bill.

2nd. That there is no right of action in complainant for the purposes of said bill, even if its allegations are all true, because, according to said allegations, the only right of action existing on behalf of complainant is a suit at law to recover the alleged rentals.

3rd. That the allegations contained in said bill do not show any valid contract between the said waterworks company and the City of Dawson, or the City Council of Dawson, under the Constitution and Laws of Georgia, but on the contrary, that said alleged contract was and is void, and that there is
43 no contract at all between complainant and the defendant.

For further cause, these defendants show that under the Constitution and Laws of the State of Georgia, the alleged contract between said waterworks company and the said city was absolutely void ab initio, because the said city had no power to make such contract, and because the making of such a contract by such a corporation as the City of Dawson, or City Council of Dawson, was and is expressly prohibited by the Constitution of the said State of Georgia, and because under said Constitution and the Charter of the City of Dawson, neither the said city nor the city council, had or has any legal power to pay the rentals claimed or to levy any tax for such purpose.

For further cause why said injunction should not issue, these defendants say that heretofore, to-wit: on the 14th day of March, 1899, the Supreme Court of Georgia, in the cause of the Dawson Waterworks Company *vs.* the City Council of Daw-

son, in a suit brought by said plaintiff against said defendant in the Superior Court of Terrell County, Georgia, for alleged rentals under said alleged contract for the year 1895, and which cause was carried to said Supreme Court by writ of error on the part of said city, decided and adjudged that, under the Constitution and Laws of the State of Georgia and its settled policy, said alleged contract was ab initio void, and that complete perfomance of such contract by said plaintiff did not prevent the municipal corporation from pleading want of power or the illegality of the contract, and also decided and adjudged in said case adversely to the plaintiff therein, namely, the said waterworks company, all the questions and contentions now made by complainant in said bill, and these defendants hereto attach a complete record of said cause in said Supreme Court, including the said judgment of the Court, as Exhibit "A," praying leave of reference thereto.

Wherefore, these defendants say that all the questions now made by complainant in said bill are res adjudicata, the said contract being adjudged void, and that these defendants were not estopped from so pleading by the said former judgment as will more fully appear from the said record and judgment.

Answer.

For further cause why said injunction should not issue and for such purpose, by way of answer to the allegations in said bill, without waiver of any objection, demurrer or other right, the said defendants do now say, that they deny each and every allegation contained in said bill, except as may be ex-
44 pressly admitted, and demand full and legal proof of the same so far as it may be proper and competent to make such proof. They do not admit that complainant is an existing corporation as alleged. They aver that by the charter of the City of Dawson the municipal corporation is to be known as styled as the "City Council of Dawson," and by this name only is capable of suing and being sued.

And by way of answer to paragraph 1 of said bill, these defendants say:

1. Defendants do not admit the execution of the mortgage or trust deed or the appointment of trustee as alleged in said paragraph of said bill, nor do they admit that any of said bonds exist or are outstanding, but they demand full and strict proof of all the allegations with reference to said bonds, the number and ownership of the same, the amounts due thereon, if any, to whom sold in the first instance, when, to whom and for what consideration afterwards assigned or delivered, and how much they brought when originally sold. While these defendants

ask for no discovery, they demand full and strict proof of all the allegations contained in paragraph 1.

2. In answer to the second paragraph, these defendants say, they deny that said bonds or any of them were ever sold in open market.

3. Defendants deny the allegations contained in the third paragraph of said bill.

4. Defendants say in answer to the allegations contained in paragraph 4 of said bill, that the alleged contract therein set forth was and is void for the reasons hereinbefore set forth, and has been so declared as will more fully appear by reference to exhibit "A" hereinbefore referred to.

5. The defendants say in answer to paragraph 5 that it is not true that said contract was entered into by said city with the full knowledge and free assent of the inhabitants comprising and constituting said municipal corportation [corporation.] They demand proof of the resolution for an election referred to and say the same was void for uncertainty as decided by the Supreme Court of Georgia in the case hereinbefore referred to and as appears from said Exhibit "A." That the said published notice of election was likewise void for the same reason, and they demand proof of the alleged notice as given. They deny that the result of such election was legally declared or published. They deny that every citizen and inhabitant of said city acquiesced in said submission of the question to popu-ar vote and in the declared result. They aver the fact to be that the question of making the alleged contract with said Ben-
45 nett and others of said waterworks company was never in any form submitted to any vote or for any approval or rejection on the part of the citizens or voters of the said city; that when said election was called and held, neither the said Bennett and others, nor the said waterworks company, nor the said contract, had ever been considered, contemplated or heard of by the said citizens or voters, or by the said mayor or aldermen or any of them.

They further say that while said resolution and notice for election were so vague and uncertain as to submit no definite or legal question to be lawfully voted on, the ballots cast at said election were printed as follows: "Waterworks" and "No Waterworks." These defendants cannot definitely or absolutely say upon what idea or inducement all the affirmative votes were cast, but they confidently assert that a vast majority of them were cast on the belief that the city proposed to build or buy waterworks; to own and operate such a property. The alleged contract, though undertaken to be made several years after the election on the strength of the same, not only being not contemplated or voted on at the time, but undertaken by

the major and council and said waterworks company, without any action of the electors of the city or any opportunity on their part to act.

They deny that every citizen, tax payer and inhabitant of said city accepted the contract as the authorized act of the City of Dawson and that the same was acquiesced in by every one, and that no objection was made thereto, and that no step was taken to prevent the carrying out of said contract. They say that, on the contrary, a number of voters objected to and voted against waterworks, and after that, others objected to said contract; that this opposition and objection grew with the experience of the people and the city with the contract and the waterworks company until such opposition and objection soon ripened into litigation on the part of the people, the city and the waterworks company.

6. The defendants admit that said waterworks company was incorporated and organized under the laws of Georgia, but if with the purpose of carrying out the provisions of said contract, it has signally failed, as will be hereafter shown.

Defendants admit that upon a test made, the city did undertake to accept said work as a compliance with said alleged contract, but they say that if at said time said works really came up to the requirements of said alleged contract, their fitness and efficiency were of short duration, and under said alleged contract, it was necessary for such fitness and efficiency to
46 be permanent. Defendants deny that since said test, the said Waterworks Company has continued to maintain and operate said system of waterworks in full compliance with the requirements of said alleged contract and has furnished to the City of Dawson full and unrestricted use of its water for protection against fire in accordance with said alleged contract and in every respect faithfully and fully met, observed, kept and performed all its obligations.

They also deny that the City of Dawson has since the 12th of August, 1891, continuously enjoyed and possessed said fire protection.

These defendants say that said city council promptly paid said company in full up to the 1st day of January, 1895, at the rate of two thousand dollars per annum, which altogether was much more money than said company was entitled to receive.

That in June, 1894, the City formally, solemnly and in good faith repudiated and renounced said contract because the same was illegal and exhorbitant.

At said time said City Council being desirous of doing what was right by said Waterworks Company, and just and best for the people of said city, offered and negotiated for a fair and legal cotract, but the said company and its alias, the American

Pipe Manufacturing Company, treated its overture with ridicule and disrespect, arbitrarily insisting on said void contract as it stood and upon full compliance on the part of the city, well knowing at the time that said contract was unfair and unjust, erroneously supposing that it was nevertheless binding.

Defendants say that since the year 1894 they have not recognized the existence of said contract, and that neither the said council itself, nor any official of said city authorized to do so, has for said city council or said municipality used any of the water of said Waterworks Company to put out any fire. If any of the officials of said city have so used said water since then, they have acted as individuals and like other individuals under such circumstances.

The City Council gave said Company due notice of the repudiation and renunciation of said contract.

7. In answer to the allegations contained in the seventh paragraph, these defendants say that the non-action of the inhabitants of the City of Dawson had no more effect to make a contract in violation of the constitution of the State of Georgia than the action of the said City Council, and these defendants again refer to the said decision and judgment of the Supreme Court of Georgia as appears in exhibit "A."

47 These defendants deny any and all assent on the part of said inhabitants and citizens to said illegal contract, and also deny that the sum of forty thousand dollars or any such sum was expended in building said works. So far as these defendants know, the inhabitants of said city are paying for the benefits of a water supply for their homes and families and their places of business, and if they or any of them are not, the remedy of the company is complete.

8. In answer to the allegations in paragraph 8, these defendants say they do not admit them or any of them. They further say that at the time said contract was being negotiated, the said R. L. Bennett stated that said R. L. Bennett & Company had money enough to build said works.

Defendants do not understand that any third parties became the owners of said bonds or furnished any money to build said works, and they demand proof thereof, if such is the case.

9. In answer to the allegations in the ninth paragraph, defendants say said city made no contract with complainant or complaint with the city, and they deny that the proceeds of said bonds amounted to forty thousand dollars or any such sum. If third parties bought said bonds on the faith of said alleged and void contract between said company and the city council, such faith on their part would impart no validity to said void contract.

The said contract being void as to said Waterworks Company

itself, could not be valid for the benefit of third persons whose rights depend solely on the rights of the Waterworks Company. If the said third parties were parties to the original contract, the contract is void as to them as well as the other original parties. Defendants deny that any present owner of any of said bonds bought them in open market or had the right to rely on said void contract as a binding obligation. At the time of the making of said alleged contract, the Supreme Court of Georgia had in effect held that such a contract would be void and had not held in any case that such a contract, if effective, did not create a debt. Defendants again refer to Exhibit "A," of the record of said case of the City Council of Dawson *vs.* The said Waterworks Company in answer to these allegations in said Paragraph 9, wherein it is held that the said Court was simply deciding what it had decided in a number of cases before that.

10. In answer to the allegations in paragraph ten, these defendants say that said council has repudiated and renounced said contract in good faith at the time mentioned, June 27th, 1894, as it was in duty bound to do, and has since then only successfully defended itself against said suit up to this date, as shown by said decision of the Supreme Court as appears by said Exhibit "A."

48 Defendants deny any effort or intention on their part to destroy the value of said works or to force said company to sell said system to said city at such price as said city saw fit to name and also deny all the other allegations in said paragraph.

11. In answer to the allegations in the eleventh paragraph of said bill, defendants say that they deny all the insinuations of improper purpose in relation to the alleged friendly suit therein mentioned, and in further reply, have only to say that they find some vindication in the fact that the Dawson Water-Works Company in this case is being sued as co-defendant with the city council of Dawson by its very late attorneys in the still pending case of the Dawson Waterworks Company *vs.* The City Council of Dawson, and that they can only hope that the present friendly contest between the plaintiff and their co-defendant in this case may have the brief and unsuccessful career of the case referred to in said paragraph.

12. Defendants in answer to the allegations of paragraph 12, say that they admit the refusal to pay the water rentals for 1895, 6, 7, 8, and also the refusal to levy a tax for the purpose of such payment, and they say that said City Council does not owe such rentals and has no legal power to levy a tax for such payment, and has not now and cannot have on hand any fund

for such purposes, as all the monies collected or collectable by said city by taxation is for other purposes.

13. In answer to the allegations in paragraph 13, these defendants say that they deny all of the same, except as to the claim that the City Council has repudiated said contract and given notice thereof.

14. In answer to the allegations in paragraph 14, defendants say that they deny the same, and they say on the contrary, that said system of waterworks is now and has been during all the years mentioned and now in dispute, namely 1895, 6, 7, 8 and 9, defective, insufficient, unreliable and almost unserviceable as means for protecting the city from fire. They say that the required amount of pressure does not and has not and has not during said years existed, that the system has not been kept in proper condition for prompt and effectual use, and that the said works are now and have been during said years so weak and unsatisfactory that on nearly every occasion when citizens have endeavored to use said waterworks to extinguish fires, the said works have largely or almost entirely failed.

These defendants now aver that said works are worse than worthless to the city and the people, that instead of affording fire protection, their existence here and the litigation connected with them have prevented and are still preventing the construction of some system that would be adequate and ef-
49 ficient, and defendants say that during all these years the said Waterworks Company has had notice and knowledge of the inadequacy and inefficiency of said works and of their failures to do satisfactory and proper work, and on one special occasion, in June of 1897, after said system on a fair and full trial, failed to work to any extent to be of service after the houses (those of Witchard and Green) had on this account been destroyed by fire, by agreement of several citizens and J. A. Horsley, superintendent of the company, a test was made by them the next day, the said Horsley furnished new and clean hose for the purpose, one hundred feet were used with one inch nozzle, and the water was thrown vertically not more than thirty feet. Defendants say that after 1894 up to that time there had been no substantial deterioration and that since said time there has been no improvement.

15. Defendants do not admit the allegations in paragraph 15.

16. In answer to the allegation in paragraph 16, defendants say that the alleged contract for the remission of taxes as therein set forth was and is utterly void under the Constitution and laws of this State, and the Supreme Court of this State has so decided in several cases. And defendants further say that since the renunciation of said contract by the city council, said council has not used or received the water of said company under the

terms of said alleged contract or otherwise, and all of said taxes for the years of 1895, 6, 7, 8, and 9, are due and unpaid.

17. Defendants deny that in the proceedings of the city council, as alleged in paragraph 17, there has been any improper purpose on the part of said council. That under said allegations in said paragraph and in said bill the City of Dawson has the legal right to build or buy or own waterworks upon complying with the requirements of the State Constitution. That the recent decision of the Supreme Court of Georgia, referred to in said paragraph construing the term "debt," and upon which it is alleged the said city council is about to act in making a sale of bonds, etc., is the same decision exhibited in Exhibit "A" heretofore attached, the complainant for some reason omitting a statement of the case. Defendants say that said city council has a right to act upon said decision as it was made by the highest judicial tribunal in this State and the highest in the United States for construing the State Constitution, and said judgment was rendered upon all the questions now made in this case and upon the identical alleged contract and between substantially the identical parties.

18. In answer to the allegations contained in the eighteenth paragraph, defendants say again that they deny having
50 used and enjoyed the water of said company as alleged, and that they, the city council, owes the debts alleged for said years or any year. They admit the failure to levy tax for the payment of the alleged debts and say the said council has no power to levy such tax for such purpose. They further say that the ability of said council to pay said alleged debt would not be destroyed by the alleged proposed purchase and expenditure by said council, for defendants say that if said council had the alleged power to levy said tax and pay said alleged debt, the ability of said council would still be ample.

19. Defendants deny that the holders of said bonds will be irreparably damaged as alleged in paragraph 19 of said bill.

20. In answer to the allegations in paragraph 20 of said bill, the defendants say they deny that said bonds are held by numerous private owners and that it is impracticable for the owners thereof, if any, to take steps for their protection, except for the reason that, on the facts and under the allegations in said bill, the alleged owners have no right or cause of action against these defendants in the premises.

They deny that there is any necessity for said alleged trustee to proceed, and aver the facts to be, from information and belief, that said trustee has proceeded not in the interest of said alleged bondholders, but at the instance of said Waterworks Company. Defendants further say that said trustee can assert no rights that cannot be asserted by said company, and said com-

pany has not declined to litigate; has not colluded with these defendants or either of them against the supposed rights or interests of the alleged bondholders or otherwise acted to authorize this proceeding against it as a defendant.

Defendants further say that said complainant has until during April last, failed to act as such trustee and failed to assert any right to collect said rentals, and give notice to said city council of such right or intention, and has allowed said Waterworks Company to collect what has been collected, namely, for the years 1892, 3 and 4, and to sue for the rental of 1895, and to litigate for the same as the sole claimant thereof, for years and until it reached an adverse decision, in which said contract was adjudged void and all the other questions now made have likewise been decided adversely to said company, and it is now too late, after the original and principal party to said contract has been cast in the suit, for a subsequent transferee, assignee or payee to litigate the same question in a different jurisdiction.

21. In answer to allegations in paragraph 21, defendants again deny that the American Pipe Manufacturing Company have transferred said bonds, and demands the production of said bonds to show that they are unpaid and outstand-
51 ing. These defendants also demand proof of the existence of said complainants and of said American Pipe Manufacturing Company, as corporations as alleged, and also demand proof of their present organization and of their rights to sue. Defendants further deny that said American Pipe Manufacturing Company has any such business in relation to the negotiations of bonds as alleged in said paragraph, and defendants deny all the allegations contained in said paragraph, especially those in reference to rights of subrogation on the part of the said American Pipe Manufacturing Company.

22. Defendants deny all the allegations of fact in the twenty-second paragraph of said bill.

And defendants, further answering, say that said Waterworks Company have no exclusive franchise for building, equipping and operating waterworks in said city, and under the Constitution and laws of Georgia, can have none. That under the said Constitution and laws, the city council of Dawson has the right to build, equip and operate waterworks in and for said city and the officials and inhabitants thereof, or to buy the same, provided only that the Constitution and laws of said State be first complied with, and that said City of Dawson has placed itself and is now in position to buy, build and operate such works or buy the same for such purpose, and that under the Constitution and laws of Georgia, the said contract with said waterworks company is null and void and has been so declared

and adjudged by the Supreme Court of said State, and that said city has the adjudged right to proceed to procure waterworks for the purposes above set forth; and that a waterworks system adequate for said city and its inhabitants is greatly needed for the health, safety and convenience of said city, and that the present system is unfit and insufficient, and cannot be made fit and sufficient without great expense, alteration, enlargement and improvement.

That the city of Dawson and all the property owners and citizens of said city are being greatly damaged by the presence of said existing system and the continued litigation by said Waterworks Company, both direct and indirect, and said Waterworks Company being insolvent, according to the allegations in said bill, and wholly unable, even with the rentals added, to pay its expenses, taxes and interest, cannot and will not so enlarge and improve as to make said system sufficient and satisfactory for said city, and also stubbornly insisting on the enforcement of a contract adjudged to be void and upon exhorbitant compensation for services almost worthless, there was and is left no course for said city to pursue but to do as it has done and to proceed to provide an adequate and satisfactory system
52 of waterworks for said city, and for the health, safety and welfare of the inhabitants thereof and for the protection of the public and private property therein.

Wherefore, defendants pray that said injunction be refused.

J. M. GRIGGS,
J. A. LAING,
H. A. WILKINSON,
GUERRY & HALL,
Attys. for Defts.

GEORGIA,
Terrell County.

In person appears before me each of the undersigned defendants, who, upon being duly sworn, says that all the allegations contained in the foregoing answer are true, so far as the same depends upon his knowledge, and that he believes them to be true so far as they depend upon information received from others.

W. B. CHEATHAM,
J. G. DEAN,
C. DEUBLER,
F. NASWORTHY,
J. S. LOWREY,
F. M. McNULTY,
F. M. JENNINGS,
JOHN SEAY.

Sworn to and subscribed before me this May 17th, 1899.
[Seal N. P.] GEO. B. ANDREWS,
Notary Public, Terrell County, Ga.

The answer and exhibits having been duly served it is agreed that they need not be filed before the hearing of the rule to show cause, but afterwards, and that the same may be used at the hearing the same as if filed.
May 31st, 1899.

HALL & WIMBERLY,
J. G. PARKS,
Pltff's. Solicitors.
GUERRY & HALL,
J. M. GRIGGS,
J. A. LAING,
H. A. WILKINSON,
Sols. for Defts. except the Dawson Waterworks Co.

Filing: Filed in Clerk's office 25 day of Aug. 1899.
O. C. FULLER,
Clerk.
By N. A. BROWN,
Deputy.

See page 606 for Exhibit "A."

53 *Answer to Amendment to Bill.*

In the Circuit Court of the United States for the Western Division of the Northern District of Georgia.

THE COLUMBIA AVENUE SAVINGS FUND, Safe Deposit, Title and Trust Co.
vs.
THE CITY OF DAWSON, *et al.*
} In Equity. No. 44.

Answering the amended bill, respondents deny each and every allegation of said amendment in so far as the same applies to their conduct or to the conduct of the City of Dawson. Defendants say that said suit in this Court is collusive, and is instituted solely for the purpose of avoiding a decision made in the case of the Dawson Waterworks Company *vs.* The City Council of Dawson in the Supreme Court of the State of Georgia. Repondents say that during all the years 1895, 1896, 1897, 1898, 1899, up to and until claim and demand for payment by this complainant for water rentals in April last and since the rendition of said decision by the Supreme Court of Georgia,

the Dawsonu Waterworks Company repeatedly and constantly demanded payment of said rentals of the City of Dawson, in its own right, and without notice or intimation that complainant had any right to collect the same. Respondents say further that upon the publication of said judgment of the Georgia Supreme Court, counsel for the Dawson Waterworks Company, who are now attorneys for the complainant in this case, and also the superintendent of the Dawson Waterworks Company, declared that said litigation had just begun; that they would now go into the United States Courts for their alleged rights as against the City of Dawson. Said Dawson Waterworks Company has during all these years, 1895, 1896, 1897, 1898 and 1899 failed to carry out its contract with said city, and has furnished, so far as it has furnished anything, a totally inefficient system of waterworks—one that has left the property of the citizens of Dawson at the mercy of fires during all this time.

Respondents declare further that they have not passed any law or ordinance or done any other act impairing the obligation of any valid contract with said Dawson Waterworks Company, nor have they passed any law or ordinance or done any other act tending to destroy private property without due compensation therefor.

Respondents do not deny that (as adjudged by the Supreme Court of Georgia they had a right to do) they have de-
54 clined to carry out the alleged contract between a former City Council of Dawson and the Dawson Waterworks Company.

They also admit that they have held an election for the purpose of authorizing the issuance of bonds, in order with the proceeds thereof, when sold, to buy or erect a new system of waterworks, but said bonds have never been issued, and no attempt has been made to sell the same, and nothing else has been done toward erecting said new system of waterworks.

It is impossible for these respondents to either admit or deny what is alleged to have passed between the complainant in this bill and the Dawson Waterworks Company, as the City of Dawson and said Dawson Waterworks Company have not been on the same confidential terms as appear to exist between the complainant and the Dawson Waterworks Company, but these respondents demand proof of said allegations.

It is true that the City of Dawson has never complained to the complainant in this bill about the waterworks or the character of the service, because the City of Dawson never knew or suspected that the said complainant was the lawful guardian for said Waterworks Company, and therefore entitled to notice of any differences between said city and said Waterworks Company; and for the further reason that when the City of Dawson

declined to carry out said contract made with the former City Council of Dawson, it refused to pay the annual water rentals, considered the contract at an end and had no right thereafter to complain to any one touching the inefficiency of the service.

Respondents having fully answered said amendment, ask to be dismissed with their reasonable costs.

J. A. LAING,
H. A. WILKINSON,
DuPONT GUERRY,
J. M. GRIGGS,
Counsel for Respondents.

GEORGIA,
Terrell County.

Personally appeared before me, a notary public in and for said county, the undersigned, who, after being duly sworn, say that the statements and averments contained in the foregoing answer, in so far as derived from their own knowledge are true, and in so far as derived from knowledge or information of others, they believe them to be true.

W. B. CHEATHAM,
F. M. McNULTY,
J. S. LOWREY,
F. M. JENNINGS,
CHAS. DEUBLER,
J. G. DEAN,
F. NASWORTHY.

55 Sworn to and subscribed before me this July 10th, 1899.

[Seal N. P.] GEO. B. ANDREWS,
Notary Public Terrell County, Georgia.

Filing: U. S. Court. Filed in Clerk's office Oct. 14, 1899.
N. A. BOWN,
Deputy Clerk.

Demurrer.

In the Circuit Court of the United States for the Western Division of the Northern District of Georgia.

COLUMBIA AVENUE, &C., COMPANY.
vs.
THE CITY OF DAWSON, *et al.*
} Bill for Injunction, Etc.

The defendants, to-wit: The City of Dawson, the City Council of Dawson, J. G. Dean, J. S. Lowrey, Charles Deubler, F. M Jennings, F. Nasworthy, A. J. Baldwin and John Seay,

by protestation not confessing or acknowledging all or any of the matters or things in said bill of complaint contained to be true in such manner and form as the same are herein set forth and alleged, demur to said bill and for cause of demurrer say:

1. That it appears from the allegations in said bill that the Court has not jurisdiction of the same.

2. That it does not appear from the allegations of said bill that the Court has jurisdiction thereof.

3. That the Dawson Waterworks Co. can, under the allegations of said bill be a party complainant only and being a resident and citizen of the said district and state there is no diversity or citizenship to give the Court jurisdiction.

4. According to the allegations of said bill as amended there is no Federal question raised or other ground of jurisdiction of said Court.

5. That complainant has not by the allegations of said bill entitled itself to any relief as is thereby sought against these defendants or any of them.

6. That complainant has an adequate and complete remedy at law for all cause of action set forth in said bill.

Wherefore these defendants pray the judgment of the
56 Court whether they shall be compelled to make answer, and pray hence to be dismissed with reasonable costs.

J. M. GRIGGS,
H. A. WILKINSON,
J. A. LAING,
GUERRY & HALL,
Defendants' Attorneys.

STATE OF GEORGIA,
County of Terrell.

The undersigned parties defendant make oath and say that the foregoing demurrer is not interposed by delay.

W. B. CHEATHAM,
F. M. McNULTY,
J. G. DEAN,
JOHN SEAY,
F. NASWORTHY,
J. S. LOWREY,
CHAS. DEUBLER.

Sworn to and subscribed before me this July 29th, 1899.
[Seal J. P.] J. W. PEDDY,
J. P., Terrell Co., Ga., 1154 District G. M.

I, DuPont Guerry, do certify that in my opinion the foregoing demurrer is well founded in point of law.

DuPONT GUERRY,
of Counsel for said defendants.

July 26, '99.
Filing: Filed in Clerk's office 31 day of July, 1899.

O. C. FULLER,
Clerk,
By N. A. BROWN,
Deputy.

Order for Injunction Pendente Lite.

In the Circuit Court of the United States for the Western Division of Northern District of Georgia.

COLUMBIA AVENUE SAVING FUND, SAFE Deposit, Title and Trust Company *vs.* CITY OF DAWSON, *and others.* } In Equity. No. 44.

After hearing argument of counsel for both parties, and after careful consideration of the evidence submitted by both parties on the application for injunction pendente lite as prayed for in the above stated bill; it is ordered and adjudged that
57 pending this suit and until further order of the Court, a writ of injunction do issue, directed to the City of Dawson, its Mayor and Aldermen, their officers, agents, confederates, abettors, restraining them, or either of them, from erecting, constructing or installing any system of waterworks in or for the City of Dawson, or other water supply for fire protection or furnishing the citizens or inhabitants of said city for domestic, sanitary or other purposes or from entering into any contract or arrangement with any person, firm or corporation for the construction, lease, operation or use of any system of waterworks, or for the supply of water for fire protection or other municipal purposes, or from laying mains or other water works, or permitting the laying of pipes or mains or the construction of water works in violation of the contract set out in complainants' bill, or the exclusive rights thereby given; or from selling or otherwise disposing of bonds, and in particular from selling or offering for sale, or disposing of, any of the bonds of the City of Dawson mentioned in complainant's bill; or from paying out any moneys for waterworks; or from incurring any obligations for waterworks; or from entering upon or carrying out any contract for waterworks save and except contract

referred to in complainant's bill; or forbidding or preventing any person, organization, fire company, or agency, from carrying out the aforesaid contract with the Dawson Water Works Company, or from placing any obstacle in the way of the due carrying out and performance and fulfillment thereof according to its terms; or from ordering, directing, ordaining, or by corporate act or ordinance or otherwise causing, advising, counseling or procuring the fire department, fire companies or other fire organizations or individuals acting as the fire department or company, or using the city's fire apparatus, to desist or refrain from the use of water furnished by the Dawson Water Works Company; or from levying or enforcing the collection of any city tax or license fee against the waterworks of the Dawson Water Works Company, stipulated to be paid in water, or by the furnishing of water as set forth in the contract, in violation of said contract with said Water Works Company; or with doing any other act in violation of the covenant, stipulation, terms and conditions of said contract.

It is further ordered that the defendants may apply to the Court at any time after thirty days from the date of this order for a test of the ability of the Dawson Water Works Company to fully and satisfactorily perform all its obligations and agreements in regard to furnishing water to the City of Dawson for all municipal purposes, extinguishing fires included, according to the letter and spirit of its contract; and thereupon
58 the Court will order a test and trial of the same by experts under the direction of a master and take such action on the master's report as equity may require.

The injunction herein ordered will issue at once and the clerk will enter the same on the minutes on the 27th day of September, to which day the Court stands adjourned.

In Chambers, Atlanta, Ga., this Sept. 16th, 1899.

DON A. PARDEE,
Circuit Judge.

Filing: Filed in Clerk's office Sept. 16, 1899.

O. C. FULLER,
Clerk.

Injunction.

United States of America, Western Division of the Northern District of Georgia.

United States Circuit Court.

The President of the United States of America: To the City of Dawson, its Mayor and Aldermen, their officers and agents, confederates and abettors, or either of them:

Whereas the Columbia Avenue Saving Fund, Safe Deposit,

Title and Trust Company has preferred its bill of complaint to the Circuit Court of the United States for the Western Division of the Northern District of Georgia, against you, praying among other things, that an injunction may issue, restraining you, the said City of Dawson, the Mayor and Aldermen of the said City of Dawson, their agents, confederates and abettors, from erecting, constructing or installing any system of waterworks in or for the City of Dawson, or other water supply for fire protection or furnishing the citizens or inhabitants of said city for domestic, sanitary or other purposes, or from entering into any contract or arrangement with any person, firm or corporation for the construction, lease, operation or use of any system of waterworks, or for the supply of water for fire protection or other municipal purposes, or from laying mains or other waterworks, or permitting the laying of pipes or mains or the construction of waterworks in violation of the contract set out in complainant's bill, or the exclusive rights thereby given; or from selling or otherwise disposing of said bonds, and in particular from selling or offering for sale, or disposing of, any of the bonds of the City of Dawson mentioned in complainant's bill; or from paying out any moneys for waterworks; or from incurring any obligations for waterworks; or from entering
59 upon or carrying out any contract for waterworks, save and except contract referred to in complainant's bill; or forbidding or preventing any person, organization, fire company, or agency from carrying out the aforesaid contract with the Dawson Water Works Company, or from placing any obstacle in the way of the due carrying out and performance and fulfillment thereof according to its terms; or from ordering, directing, ordaining, or by corporate act or ordinance or otherwise causing, advising, counselling or procuring the fire department, fire companies, or other fire organizations or individuals acting as the fire department or company, or using the city's fire apparatus, or desist or refrain from the use of water furnished by the Dawson Water Works Company; or from levying, or enforcing the collection of any city tax or license fee against the waterworks of the Dawson Water Works Company, stipulated to be paid in water, or by the furnishing of water as set forth in the contract, in violation of said contract with said Water Works Company; or with doing any other act in violation of the covenant, stipulation, terms and conditions of said contract.

And Whereas, on said bill being exhibited to the Hon. Don A. Pardee, Judge of the United States Circuit Court, for the Fifth Judicial Circuit, on the 16th day of September, A. D. 1899, he did order that a Writ of Injunction issue out of said Court, according to the prayer of said bill:

These, therefore, are to command and strictly enjoin you, under penalty of ten thousand dollars, that you do, from henceforth, altogether and absolutely desist from erecting, constructing or installing any system of waterworks in or for the City of Dawson, or other water supply for fire protection or furnishing the citizens or inhabitants of said city for domestic, sanitary, or other purposes or from entering into any contract or arrangement with any person, firm or corporation for the *construction, lease, operation*, or use of any system of waterworks, or for the supply of water for fire protection or other municipal purposes, or from laying mains or other waterworks, or permitting the laying of pipes or mains or the construction of waterworks in violation of the contract set out in complainant's bill, or the exclusive rights thereby given; or from selling or otherwise disposing of bonds, and in particular from selling or offering for sale, or disposing of any of the bonds of the City of Dawson mentioned in complainant's bill; or from paying out any moneys for waterworks; or from incurring any obligations for waterworks; or from entering upon or carrying out any contract for waterworks save and except contract referred to in complainant's bill; or forbidding or preventing any person, organization, fire company, or agency, from carrying out the aforesaid contract with the Dawson Waterworks Company, or from placing any obstacle in the way of the due carrying out and performance and fulfillment thereof according to its terms; or from ordering, directing, ordaining, or by corporate act or ordinance or otherwise causing, advising, counselling or procuring the fire department, fire companies, or other fire organizations or individuals acting as the fire department or company, or using the city's fire apparatus, or desist or refrain from the use of water furnished by the Dawson Waterworks Company; or from levying or enforcing the collection, of any city tax or license fee against the waterworks of the Dawson Waterworks Company, stipulated to be paid in water, or by the furnishing of water as set forth in the contract, in violation of said contract with said Waterworks Company; or with doing any other act in violation of the covenant, stipulation, terms and conditions of said contract, until the further order of said Court. And this you will in no wise omit, under penalty, &c.

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Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 16th day of September, A. D. 1899.

O. C. FULLER,
Clerk.

[Seal C. C. N. D. W. D. Ga.]

Service: Sept. 19th, '99.

Due and legal service of the within writ of injunction acknowledged and receipt of copy acknowledged on behalf of the defendants, except the Dawson Waterworks Co.

H. A. WILKERSON,
J. M. GRIGGS,
J. A. LAING,
GUERRY & HALL,
Attys. for Defts. except the Dawson Waterworks Co.

Service acknowledged for Dawson Waterworks Co. and copy waived. Sept. 19th, '99.

J. A. HORSLEY,
Agt. and Supt. of the Dawson Waterworks Company.

Filing: Filed in Clerk's office 22 day of Sept., 1899.

O. C. FULLER,
Clerk,
By N. A. BROWN,
Deputy.

61 *Order Overruling Demurrer.*

United States Circuit Court, Western Division, Northern District of Georgia.

COLUMBIA AVENUE SAVING FUND, SAFE DEPOSIT, TITLE & TRUST COMPANY, Complainant, *vs.* CITY OF DAWSON ET AL., Defendants. } In Equity. No. 44.

This cause came on to be heard at this term on the demurrer to the complainant's bill, and was argued:

Whereupon, considering the law and equity to be with the complainant and the demurrer to said bill not well taken, it is ordered and adjudged that the said demurrer be and the same is hereby overruled, and defendants have leave to otherwise plead or answer by the August rule.

This 8th day of July, 1901.

DON A. PARDEE,
Circuit Judge.

Filing: Filed in clerk's office 8th July, 1901.

O. C. FULLER, *Clerk,*
By N. A. BROWN, *Deputy.*

62 *Answer of All the Defendants.*

THE COLUMBIA AVENUE SAVING FUND, SAFE Deposit, Title and Trust Company
vs.
THE CITY OF DAWSON and Others
} In Equity. No. 44.

Bill for injunction, etc., in Circuit Court of the United States for the Western Division of the Northern District of Georgia.

And now come the City of Dawson, the City Council of Dawson and W. B. Cheatham, J. G. Dean, J. S. Lowrey, Charles Deubler, F. M. Jennings, F. Nasworthy, F. M. McNulty, and A. J. Baldwin, and John Seay, and before making answer to the bill in the above stated cause by way of information to the court and to the plaintiff show that since the filing of said bill the following changes have occurred in the status of the parties defendant, namely:

John W. F. Lowrey has succeeded W. B. Cheatham as mayor of said city; and S. R. Christie and A. J. Baldwin have succeeded J. S. Lowrey and F. M. McNulty as councilmen; and J. H. Oxford has succeeded John Seay as city marshal; and all of the said successors to the offices of mayor and councilmen and city marshal are the present incumbents.

All of the above defendants by protestation not confessing or acknowledging all or any of the matters and things in said plaintiff's bill of complaint mentioned and contained to be true, as therein alleged and for answer to said bill do say:

1. That the alleged defendant, The Dawson Waterworks Company, which is a corporation created and organized under the laws of Georgia and resident therein now and at the time of the fil-
63 ing of said bill, namely, in said city of Dawson and county of Terrell, was and is the real complainant, and that the action of the said defendant and of alleged complainant set forth and exhibited to said bill was and is collusive, and was had during the month of April last and since the judgment of the supreme court of Georgia in the cause of The City Council of Dawson *vs.* the said, The Dawson Waterworks Company, was rendered, on said alleged contract declaring the same void, (which judgment together with the record in said case, duly certified is now on file in this court and case as an exhibit to the answer of these defendants for cause why the injunction should not be granted), in order to obtain jurisdiction in this honorable court in a new name and under an alleged new created right of action, which does not exist except to the extent created as above stated, and for the purpose of avoiding the said judgment of the supreme court, which is final and conclusive of all the questions decided in that case and all the questions now made by said bill in this case.

2. The court has no jurisdiction of said bill as amended, assuming

all the allegations therein to be true, all of which allegations, so far as the same are material, are here and now denied. Wherefore these defendants pray the court to proceed no further in the cause, but to dismiss said bill for want of jurisdiction. And for further answer the defendants say: That under the constitution and laws of the State of Georgia, the alleged contract between said Waterworks Company and the said city was absolutely void *ab initio*, because the making of such a contract by such a corporation as the city of Dawson, or the city council of Dawson, was and is expressly prohibited under said constitution of the said State of Georgia,
64 and because under said constitution and the charter of the city of Dawson, neither the said city nor the city council, had or has any legal power to pay the rentals claimed, or to levy any tax for such purpose.

For further answer defendants say that, on the 14th day of March, 1899, the supreme court of Georgia, in the cause of The Dawson Waterworks Company *vs.* The City Council of Dawson, in a suit brought by said plaintiff against said defendant in the superior court of Terrell county, Georgia, for alleged rentals under said alleged contract for the year 1895, and which cause was carried to said supreme court by writ of error on the part of said city, decide- and adjudged that, under the constitution and laws of the State of Georgia and its settled policy, said alleged contract was *ab initio* void, and that complete performance of such contract by said plaintiff did not prevent the municipal corporation from pleading want of power or the illegality of the contract, and also decided and adjudged in said case adversely to the plaintiff therein, namely, the said waterworks company, all the questions and contentions now made by complainant in said bill. And defts aver that the complainant is a mere privy and assignee of the causes of action now sued on and have become such of the said Dawson Waterworks Company since said judgment. The defts, heretofore, having already attached a duly certified and complete record of said cause in said supreme court including the said judgment of the court as Exhibit "A" to said answer for cause as hereinbefore referred to and the same now being *a* file in this cause defendants pray leave to refer to the same as often as may be necessary and to be excused from attaching another such record to this answer.

Wherefore these defts say that all the questions as now made in said bill as amended are *res adjudicata*, the said contract ad-
65 judged void, and the right of these defts to so plead established and adjudged not to be estopped, all of which will fully appear from the said record and judgment.

Whereupon defts now pray that this honorable court in deference to said judgment follow the same and decree to the same effect.

For further answering said bill as amended, the said defts do now say, that they deny each and every allegation contained in said bill,

except as may be expressly admitted, and demand full and legal proof of the same so far as it may be proper and competent to make such proof. They do not admit that complainant is an existing corporation as alleged. They aver that by the charter of the city of Dawson the municipal corporation is to be known and styled as the "city council of Dawson," and by this name only is capable of suing and being sued.

And by way of answer to paragraph 1 of said bill, these defendants say:

1. Defendants do not admit the execution of the mortgage or trust deed or the appointment of trustee as alleged in said paragraph of said bill, nor do they admit that any of said bonds exist or are outstanding, but they demand full and strict proof and ownership of the same, the amounts due thereon, if any, to whom sold in the first instance, when, to whom and for what consideration afterwards assigned or delivered, and how much they brought when originally sold. While these defendants ask for no discovery, they demand full and strict proof of all the allegations contained in paragraph 1.

2. In answer to the second paragraph, these defendants say, they deny that said bonds or any of them were ever sold in open
66 market.

3. Defendants deny the allegations contained in the third paragraph of said bill, as to the issue and sale of said bonds for the purpose mentioned; that the money was advanced by the original purchaser of said bonds; and that said contract with the city furnished the necessary and principal source of revenue and so forth.

—. Defendants say in answer to the allegations contained in paragraph 4 of said bill, that the alleged contract therein set forth was and is void for the reasons hereinbefore set forth, and has been so declared as will more fully appear by reference to Exhibit "A" hereinbefore referred to.

5. The defendants say in answer to paragraph 5 that it is not true that the said contract was entered into by said city with the full knowledge and free assent of the inhabitants comprising and constituting said municipal corporation. They demand proof of the resolution for an election referred to and say the same was void for uncertainty as decided by the supreme court of Georgia in the case hereinbefore referred to and as appears from said Exhibit "A." That the said published notice of election was likewise void for the same reason, and they demand proof of the alleged notice as given. They deny that the alleged election was legal or amounted to any legal expression of the will of the people of said city. They deny that the result of such election was legally declared or published. They deny that every citizen and inhabitant of said city acquiesced in said submission of the question to popular vote and in the declared result. They aver the fact to be that the question of making the alleged contract with said Bennett and others or said
67 waterworks company was never in any form submitted to any vote or for any approval or rejection on the part of the citi-

zens or voters of the said city; that when said election was called and held, neither the said Bennett and others, nor the said waterworks company, nor the said contract had ever been considered, contemplated or heard of by the said citizens or voters, or by the said mayor or aldermen or any of them.

They further say that while said resolution and notice for election were so vague and uncertain as to submit no definite or legal question to be lawfully voted on, the ballots cast at said election were printed as follows: "Waterworks and no waterworks." These defendants cannot definitely or absolutely say upon what idea or inducement all the affirmative votes were cast, but they confidently assert that a vast majority of them were cast on the belief that the city proposed to build waterworks; to own and operate such a property. The alleged contract, though undertaken to be made several years after the election on the strength of the same, not only being not contemplated or voted on at the same time, but was undertaken by the mayor and council of the city without authority on their part to act and without the citizens having an opportunity to express their wishes. They deny that every citizen, tax payer and inhabitant of said city accepted the contract as the authorized act of the city of Dawson and that the same was acquiesced in by every one, and that no objection was made thereto, and that no step was taken to prevent the carrying out of said contract. They say that, on the contrary, a number of voters objected to and voted against waterworks, and after that, others objected to said contract; that this opposition and objection grew with the experience of the people and the city with the contract and the waterworks com-
68 pany until such opposition soon ripened into litigation on the part of the people, the city and the waterworks company.

6. The defendants admit that said waterworks company was incorporated and organized under the laws of Georgia, but with the purpose of carrying out the provisions of said contract, it has signally failed, as will be hereafter shown.

Defendants admit that upon a test made, the city did undertake to accept said works as a compliance with said alleged contract, but they say that if at said time said works really came up to the requirements of said alleged contract, their fitness and efficiency were of short duration, and under said alleged contract, it was necessary for such fitness and efficiency to be permanent. Defendants deny that since said test, the said waterworks company has continued to maintain and operate said system of waterworks in full compliance with the requirements of said alleged contract and has furnished to the city of Dawson full and unrestricted use of its water for protection against fire in accordance with said alleged contract and in every respect faithfully and fully met, observed, kept and performed all its said obligations as alleged.

They also deny that the city of Dawson has since the 12th of August, 1891, continuously enjoyed and possessed said fire protection as alleged. These defendants say that said city council promptly

paid said company in full up to the 1st day of January, 1895, at the rate of two thousand dollars per annum, which altogether was much more money than said company should have received.

That in June, 1894, the city formally, solemnly and in good faith repudiated and renounced said alleged contract because the same was illegal and ex*h*orbitant, said city council being desirous of doing what was right by said waterworks company, and just and best for the people of said city, offered and negotiated for a fair and legal contract, but the said company and its alias, the American Pipe Manufacturing Company, treated its overture with ridicule and disrespect, arbitrarily insisting on said void contract as it stood and upon full compliance on the part of the city, well knowing at the time that said contract was unfair and unjust, erroneously supposing that it was nevertheless binding.

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Defendants say that since the year 1894 they have not recognized the existence of said contract, and that neither the said council itself, nor any official of said city authorized to do so, has for said city council or said municipality used any of the water of said waterworks company to put out any fire. If any of the officials of said city have so used said water since then, they have acted as individuals and like other individuals under such circumstances.

The city council gave said company due notice of the repudiation and renunciation of said alleged contract.

7. In answer to the allegations contained in the seventh paragraph, these defendants say that the non-action of the inhabitants of the city of Dawson had no more effect to make a contract in violation of the constitution of the State of Georgia than the action of the said city council, and these defendants again refer to the said decision and judgment of the supreme court of Georgia as appears in Exhibit "A" heretofore described.

These defendants deny any and all assent on the part of the said inhabitants and citizens to said illegal contracts, and also deny that the sum of forty thousand dollars or any such sum was expended in building said works. So far as these defendants know, the inhabitants of said city are paying for the benefits of a water supply for their homes and families and their places of business, and if they or any of them are not, the remedy of the company is complete.

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8. In answer to the allegations in paragraph 8, these defendants say that they do not admit them or any of them. They further say that at the time that said contract was being negotiated, the said R. L. Bennett stated that R. L. Bennett & Company had money to build said works.

Defendants do not understand that any third parties became the owners of said bonds or furnished any money to build said works, and they demand proof thereof, if such is the case.

9. In answer to the allegations in the ninth paragraph, defendants say said city made no contract with the complainant or complainant with the city, and they deny that the proceeds of said

bonds amounted to forty thousand dollars or any such sum. If third parties bought said bonds on the faith of said alleged and void contract between said company and the city council, such faith on their part would impart no validity to said void contract.

The said contract being void as to said waterworks company itself could not be valid for the benefit of third persons whose rights depend solely on the rights of the waterworks company. If the said third parties were parties to the original contract, the contract is void as to them as well as to the other original parties. Defendants deny that any present owner of any of said bonds bought them in open market or had the right to rely on said void contract as a binding obligation. At the time of the making of said alleged contract the supreme court of Georgia had in
71 effect held that such a contract would be void and had not held in any case that such a contract, if effective, did not create a debt. Defendants again refer to Exhibit "A" of the record of said case of the City Council of Dawson *vs.* The said Waterworks Company in answer to these allegations in said paragraph 9, wherein it is held that the said court was simply deciding what it had decided in a number of cases.

10. In answer to the allegations in paragraph ten, these defendants say that said council has repudiated and renounced said alleged contract in good faith at the time mentioned, June 27th, 1894, as it was in duty bound to do, and has since then only successfully defended itself against said suit up to this date, as shown by said decision of the supreme court as appears by said Exhibit "A."

Defendants deny any effort or intention on their part to destroy the value of said works or to force said company to sell said system to said city at such price as said city saw fit to name and also deny all the other allegations in said paragraph.

11. In answer to the allegations in the eleventh paragraph of said bill, defendants say that they deny all the insinuations of improper purpose in relation to the alleged friendly suit therein mentioned, and in further reply, have only to say that they find some vindication in the fact that the Dawson Waterworks Company in this case is being sued as co-defendant with the City Council of Dawson by its very late attorneys in the still pending case of The Dawson Waterworks Company *vs.* The City Council of Dawson, and that they can only hope that the present friendly contest between the plaintiff and their co-defendant in this case may have the brief and unsuccessful career of the case referred to in said paragraph.

72 12. Defendants in answer to the allegations of paragraph 12, say that they admit the refusal to pay the water rentals for 1895, '6, '7, '8, and also the refusal to levy a tax for the purpose of such payment, and they say the said city council does not owe such rentals and has no legal power to levy a tax for such payment, and has not now and cannot have on hand any fund for such purposes, as all the monies collected or collectable by said city by taxation *is* for other purposes.

13. In answer to the allegations in paragraph 13, these defendants say that they deny all of the same, except as to the claim that the city council has repudiated said contract and given notice thereof.

14. In answer to the allegation in paragraph 14, defendants say that they deny the same, and they say on the contrary, that said system of waterworks has been during all the years mentioned and in dispute, namely, 1895, '6, '7, '8 and '9, defective, insufficient, unreliable and almost unserviceable as means for protecting the city from fire. They say that the required amount of pressure did not exist during said years, that the system was not kept in proper condition for prompt and effectual use, and that the said works were during said years so weak and unsatisfactory that on nearly every occasion when citizens endeavored to use said waterworks to extinguish fires, the said works largely or almost entirely failed.

These defendants now aver that said works instead of affording fire protection, their existence here and the litigation connected with them prevented the construction of some system that would be ade-

73 quate and efficient, and defendants say that during all these years the said waterworks company had notice and knowledge of the inadequacy and inefficiency of said works and of their failure to do satisfactory and proper work, and on one special occasion, in June of 1897, after said system on a fair and full trial, failed to work to any extent to be of service after the houses, (those of Witchard and Green), had on this account been destroyed by fire, by agreement of several citizens and J. A. Horsley, superintendent of the company, a test was made by them the next day, the said Horsley furnished new and clean hose for the purpose, one hundred feet were used with one inch nozzle, and the water was thrown vertically not more than thirty feet. Defendants say that after 1894 up to that time there had been no substantial deterioration and that since said time there has been no improvement up to the date of the filing of said bill.

15. Defendants do not admit the allegations in paragraph 15, but deni*es* the same as to notice and as to the waterworks company living up to its contract; as to the saving of many thousand dollars to the citizens and tax pa*p*ers and so forth; and as to the saving of the Baldwin property and so forth.

16. In answer to the allegation in paragraph 16, defendants say that the alleged contract for the remission of taxes as therein set forth was and is utterly void under the constitution and laws of this State, and the supreme court of this State has so decided in several cases. And the defendants further say that since the renunciation of said contract by the city council, said council has not used or received the water of said company under the terms of said alleged contract or otherwise, and all of said taxes for the years of 1895, '6, '7, '8, and '9, are due and unpaid.

74 17. Defendants deny that in the proceedings of the city council, as alleged in paragraph 17, there has been any improper purpose on the part of said council. That under said allega-

tions in said paragraph and in said bill the city of Dawson has the legal right to build or buy or own waterworks upon complying with the requirements of the State constitution. That the recent decision of the supreme court of Georgia, referred to in said paragraph construing the term "debt," and upon which it is alleged the said city council is about to act in making a sale of bonds, and so forth, is the same decision exhibited in Exhibit "A" heretofore attached, the complainant for some reason omitting a statement of the case. Defendants say that said city council has a right to act upon said decision as it was made by the highest judicial tribunal in this State and the highest in the United States for construing the State constitution, and said judgment was rendered upon all the questions now made in this case and upon the identical alleged contract and between substantially the identical parties.

18. In answer to the allegations contained in the eighteenth paragraph, defendants say again that they deny having used and enjoyed the water of said company as alleged, and that they, the city council, owes the debts alleged for said years or any year. They admit the failure to levy tax for the payment of the alleged debts and say the said council has no power to levy tax for such purpose. They further say that the ability of said council to pay said alleged debt would not be destroyed by the alleged proposed purchase and expenditure by said council, for defendants say that if said council had the alleged power to levy said tax and pay said alleged debt, the ability of said council would still be ample.

75 Defendants deny that the holders of said bonds will be irreparably damaged as alleged in paragraph 19 of said bill.

20. In answer to the allegations in paragraph 20, of said bill, the defendants say that they deny that said bonds are held by numerous private owners and that it is impracticable for the owners thereof, if any, to take steps for their protection, except for the reason that, on the facts and under the allegations in said bill, the alleged owners have no right or cause of action against these defendants in the premises. They deny that there is any necessity for said alleged trustee to proceed, and aver the facts to be, from information and belief, that said trustee had proceeded not in the interest of said alleged bondholders, but at the instance of the said waterworks company. Defendants further say that said trustee can assert no rights that cannot be asserted by said company, and said company has not declined to litigate; has not colluded with these defendants or either of them against the supposed rights or interests of the alleged bondholders or otherwise acted to authorize this proceeding against it as a defendant.

Defendants further say that said complainant has until during April last, failed to act as such trustee and failed to assert any right to collect said rentals, and give notice to said city council of such right or intention, and has allowed said waterworks company to collect what has been collected, namely, for the years 1892, '3 and '4, and to sue for the rental of 1895, and to litigate for the same as the

sole claimant thereof, for years and until it reached an adverse decision, in which said contract was adjudged void and all the other questions now made have likewise been decided adversely to
76 said company, and it is now too late, after the original party to said contract has been cast in the suit, for a subsequent transferee, assignee or payee to litigate the same question in a different jurisdiction.

21. In answer to allegations in paragraph 21, defendants again deny that the American Pipe Manufacturing Company have transferred said bonds, and demands the production of said bonds to show that they are unpaid and outstanding. These defendants also demand proof of the existence of said complainants and of said American Pipe Manufacturing Company, as corporations as alleged, and also demand proof of their present organization and of their rights to sue. Defendants further say that the American Pipe Manufacturing Company has no such business in relation to the negotiation of bonds as alleged in said paragraph, especially those in reference to rights of subrogation on the part of the said American Pipe Manufacturing Company.

22. Defendants deny all the allegations of fact in the twenty-second paragraph of said bill.

And defendants, further answering, say that said waterworks company have no exclusive franchise for building, equipping and operating waterworks in said city, and under the constitution and laws of Georgia, can have none. That under the said constitution and laws, the city council of Dawson has the right to build, equip and operate waterworks in and for said city and the officials and inhabitants thereof, or to buy the same, provided only that the constitution and laws of said State be first complied with, and that said city of Dawson has placed itself and is now in position to buy, build and operate such works or buy the same for such purpose, and that under
77 the constitution and laws of Georgia, the said contract with said waterworks company is null and void and has been so declared and adjudged by the supreme court of said State, and that said city has the adjudged right to proceed to procure waterworks for the purposes set forth; and that a waterworks system adequate for said city and its inhabitants is necessary for the health, safety and convenience of said city. These defendants again deny the allegations in said bill as to the adequacy of said system.

That the city of Dawson and all the property-owners and citizens of said city have been greatly damaged by the presence of said existing system and the continued litigation by said waterworks company, both direct and indirect, and said waterworks company being insolvent, according to the allegations in said bill, it became the right and duty of said city to do as it has done and to proceed to provide an adequate and satisfactory system of waterworks for said city, and for the health, safety and welfare of the inhabitants thereof and for the protection of the public and private property therein.

Answering the amendment to said bill respondents deny each

and every allegation of said amendment in so far as the same applies to their conduct or to the conduct of the city of Dawson. Defendants say that said suit in this court is collusive, and is instituted solely for the purpose of avoiding a decision made in the case of The Dawson Waterworks Company *vs.* The City Council of Dawson in the supreme court of the State of Georgia. Respondents say that during all the years 1895, 1896, 1897, 1898, 1899, up to and until claim and demand for payment by this complainant for water rentals in April last and since the rendition of said decision by the supreme court of Georgia, the Dawson Waterworks Company repeatedly and constantly demanded payment of said rentals of
78 the city of Dawson, in its own right, and without notice or intimation that complainant had any right to collect the same. Respondents say further that upon the publication of said judgment of the Georgia supreme court, counsel for the Dawson Waterworks Company, who are now attorneys for the complainant in this case, and also the superintendent of the Dawson Waterworks Company, declared that said litigation had just begun; that they would now go into the United States courts for their alleged rights as against the city of Dawson. Said Dawson Waterworks Company has during all the years 1895, 1896, 1897, 1898 and 1899 failed to carry out its contract with said city, and has furnished, so far as it furnished anything, a totally inefficient system of waterworks—one that left the property of the citizens of Dawson at the mercy of fires during all this time.

Respondents declare further that they have not passed any law or ordinance or done any other act impairing the obligation of any valid contract with said Dawson Waterworks Company, nor have they passed any law or ordinance or done any other act tending to destroy private property without due compensation therefor.

Respondents do not deny that (as adjudged by the supreme court of Georgia they had a right to do) they have declined to carry out the alleged contract between a former city council of Dawson and the Dawson Waterworks Company.

They also admit that they have held an election for the purpose of authorizing the issuance of bonds, in order with the proceeds thereof, when sold, to buy or erect a new system of waterworks, but said bonds have never been issued, and no attempt has been made to sell the same, and nothing else has been done toward erecting said system of waterworks.

79 It is impossible for these respondents to have passed between the complainant in this bill and the Dawson Waterworks Company, as the city of Dawson and said Dawson Waterworks Company have not been on the same confidential terms as appear to exist between the complainant and the Dawson Waterworks Company, but these respondents demand proof of said allegations.

It is true that the city of Dawson has never complained to the complainant in this bill about the waterworks or the character of the service, because the city of Dawson never knew that the said

complainant was entitled to notice of any difference between said city and said waterworks company; and for the further reason that when the city of Dawson declined to carry out said alleged contract made with the former city council of Dawson, it refused to pay the annual water rentals, considered the contract at an end and had no right thereafter to complain to any one touching the inefficiency of the service.

And these defendants further answering all of the allegations in said bill to the effect that the Dawson Waterworks Company had fully performed its contract do now deny said allegations and do say in addition to what has already been set forth in this answer on that subject, that the water furnished by said company as referred to in said allegations was not only inadequate for protection against fire but impure and unwholesome and unfit for domestic use and sanitary and other useful purposes.

They further say that at times said water was so muddy that it was not only unfit to drink but was unfit for bathing purposes, and that on one occasion when said water was sought to be used to extinguish fire in Baldwin"s lumber yard on or about the 28
80 day July, 1896, the said water was so thick with mud that for some time the same could not be used for said purpose, the delay being very disastrous so far as said fire was concerned.

Defendants further say that there were other times and occasion prior to the filing of said bill when said water was so muddy as to be unfit for use for the extinguishment of fire.

These def'ts further aver the fact to be that it was well understood that the water that was accepted by resolution of the council March 14th, 1891, was to come from the following springs, namely, No. 1 spring at Dunn's; No. 2 spring above bridge; No. 3 at James T. Lee's; and No. 4 on Dr. Farrar's farm; and said water was accepted upon analysis made by Prof. H. C. White, of waters taken from said springs.

Defendants aver that after the acceptance of said water and up to the time of filing of said bill the said company had furnished waters from said springs together with surface waters and branch water and from the waters washing from the adjacent hills and fields near the city and allowed to accumulate in swampy low land covered with undergrowth, weeds &c., which said waters *was* so furnished without being filtered, after being conveyed from said marsh by an open ditch and loaded with mud and filth by every rain.

Respondents having fully answered said bill and amendment, ask to be dismissed with their reasonable costs.

A. M. RAINES,
J. A. LAING,
GUERRY & HALL,
Sols. for Def'ts.

81 THE UNITED STATES OF AMERICA, }
County of Terrell, City of Dawson, State of Georgia. }

On this the 2nd day of August, 1901, before me personally appeared J. W. F. Lowrey, and makes oath and says, that he is the mayor of the city of Dawson said State and county. That so much of the foregoing answer as concerns his own act and deed are true to the best of his knowledge, and that so much thereof as concerns the act or deed of others he believes to be true. He further says that so much thereof as concerns the acts or deeds of the city of Dawson and of the city council of Dawson and the councilmen of Dawson and of the Dawson Waterworks Company and of the officers and agents thereof, and of the plaintiff and its officers and agents he believes to be true.

He makes this affidavit on behalf of the city of Dawson and of the city council of Dawson.

J. W. F. LOWREY.

Sworn to before me this the 2nd day of August, 1901.
[SEAL N. P.] J. MERCER BELL,
N. P., T. Co., Ga.

THE UNITED STATES OF AMERICA, }
County of Terrell, City of Dawson, State of Georgia. }

On this the 2nd day of August, 1901, W. B. Cheatham, J. G. Dean, J. S. Lowrey, Charles Deubler, F. M. Jennings, F. Nasworthy, F. M. McNulty, John Seay and A. J. Baldwin, make oath and say, that they are the parties so named and served in the bill above mentioned, and that so much of the foregoing answer as concern their acts and deeds is true to the best of their knowledge, and that so much thereof as concerns the acts or deeds of others they believe to be true.

F. M. McNULTY.
CHAS. DEUBLER.
F. NASWORTHY.
JOHN SEAY.
A. J. BALDWIN.
F. M. JENNINGS,
J. S. LOWREY.
J. G. DEAN.

82 Sworn to before me this 2nd day of August, 1901.
[SEAL N. P.] J. MERCER BELL,
N. P., T. Co., Ga.

Filing: Filed in clerk's office 3 August, 1901.
O. C. FULLER, *Clerk*,
By N. A. BROWN, *Depufy*

Replication.

In the Circuit Court of the United States for the Western Division of the Northern District of Georgia.

THE COLUMBIA AVENUE SAVING FUND, SAFE Deposit, Title and Trust Company
vs.
THE CITY OF DAWSON and Others.
In Equity. No. 44.

Replication of The Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Company, plaintiff, to the answer of The City of Dawson, The City Council of Dawson, W. B. Cheatham, J. G. Dean, J. S. Lowrey, Charles Deubler, F. M. Jennings, F. Nasworthy, F. M. McNulty, A. J. Baldwin, and John Seay, defendants.

This repliant, The Columbia Avenue Saving Fund, Safe Deposit Title and Trust Company, saving and reserving to itself all and all manner of advantage of exception, which may be had and taken to the manifold errors, uncertainties, and insufficiencies of the answer of the defendants, for replication thereunto, saith, that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in law, to be replied unto by this repliant; without that, that any other matter or thing in the
83 said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by *his* said bill it hath prayed.

HALL & WIMBERLY, *Macon, Ga.*,
J. G. PARKS, *Dawson, Ga.*,
Solicitors for Plaintiff The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Co.

JOHN I. HALL.
OLIN J. WIMBERLY,
Of Counsel for Plaintiff.

Filed: Filed in clerk's office 2 day of Sept. 1901.

O. C. FULLER, *Clerk*,
By N. A. BROWN, *Deputy.*

84 *In re* Bonds.

In the Circuit Court of the United States for the Western Division of the Northern District of Georgia.

THE COLUMBIA AVENUE SAVING FUND, SAFE Deposit, Title and Trust Company		
vs.		
THE CITY OF DAWSON, W. B. CHEATHAM, J. G. Dean, J. S. Lowrey, Charles Deubler, F. M. Jennings, F. Nasworthy, F. M. McNulty, A. J. Baldwin, John Seay, and The Dawson Waterworks Company.	In Equity.	No. 44.

The parties in the above stated case do now agree that at the hearing of the application for the injunction therein before his honor Don A. Pardee, circuit judge, the complainant had present the bonds set forth in the bill and offered to introduce the same in evidence by using one of the same as representative of all, and counsel for respondent thereupon agreed that said bonds need not be introduced, or any of them, and that they need not remain of record or any of them, but that all of them might be withdrawn and withheld, said counsel for respondents then and there agreeing and admitting that the existence and ownership of the bonds as set forth in said bill so far as said hearing was concerned had been fully proved. The said respondents having proceeded to appeal the grant of the injunction in said case from said court to the United States circuit court of appeals for the fifth circuit, and neither the bonds referred to appearing of record, nor the above agreement and admission, the parties do now pray the court to approve the above agreement and admission as true and order the same filed of record, so that the transcript of said agreement and the order of the court in connection therewith may go up in the transcript of the record of said cause.

85

GUERRY & HALL,
Sols. for Respondents.
HALL & WIMBERLY,
J. G. PARKS,
Solicitors for Defendants.

Order.

Upon reading the foregoing agreement and application, it is ordered that the said agreement be and it is hereby certified as true, and it is ordered that the said agreement be filed and made a part of the record in said cause together with this order, and that said agreement together with this order do constitute a part of the record

in said cause and included in the transcript of the clerk to be sent to the court of appeals as prayed.

This the 27th day of October, 1899.

DON A. PARDEE,
Circuit Judge.

Filing: Filed in clerk's office 27 Octo. '99.

O. C. FULLER, *Clerk*,
By N. A. BROWN, *Deputy.*

86 *Order of Reference to Special Master.*

In the Circuit Court of the United States for the Western Division of the Northern District of Georgia.

THE COLUMBIA AVENUE SAVING FUND, SAFE DEPOSIT, Title and Trust Co., Plaintiff, vs. THE CITY OF DAWSON, W. B. CHEATHAM, J. G. DEAN, J. S. Lowrey, Charles Deubler, F. M. Jennings, F. Nasworthy, F. M. McNulty, A. J. Baldwin, Jno. Seay, The Dawson Waterworks Co., Defendants.	In Equity. No. 44.

Comes now the above named complainant and moves the court that this cause be referred to a master to hear the testimony and take proofs touching the matters in issue in the above stated cause upon the complainant's above stated bill of complaint and the amendment thereto, and the answers of the several defendants thereto, and the replication filed by the complainant to said answers, and to make his findings and report the same to the court.

J. G. PARKS,
HALL & WIMBERLY,
Solicitors for Complainant, The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Co.

Due and legal service acknowledged, but we do not consent and wish to be heard. This November 11th, 1901.

J. A. LAING,
GUERRY & HALL,
Att'ys for Def'ts.

87 In the Circuit Court of the United States for the Western Division of the Northern District of Georgia.

THE COLUMBIA AVENUE SAVING FUND, SAFE Deposit, Title and Trust Co., Plaintiff,
vs.
THE CITY OF DAWSON, W. B. CHEATHAM, J. D. Dean, J. S. Lowrey, Charles Deubler, F. M. Jennings, F. Nasworthy, F. M. McNulty, A. J. Baldwin, Jno. Seay, The Dawson Waterworks Co., Defendants. } In Equity. No. 44.

This cause coming on to be heard upon the application of complainant for reference thereof, and it appearing to the court that the said cause is at issue upon the complainant's bill of complaint, and the amendment thereto, and the defendant's answers to said bill and amendment and the general replication filed by the complainant to said answers, and it appearing that a reference of said cause should be had for taking of proofs, touching the matters in issue, and to ascertain and report upon the several matters and questions in issue in said cause, it is now here ordered that the said cause be and the same is hereby referred to Wm. A. Wimbish, a standing master of this court, and he is hereby made a master in said cause and directed to take proofs on all and singular the issues herein, and to ascertain and report touching all matters in issue in said cause, and he is authorized to discharge his duties as such master at any convenient place, as he may be advised, outside of, as may be agreed, as well as within, the said district.

In open court this 2 day of Dec. 1901.

WM. T. NEWMAN, *U. S. Judge.*

We consent.

LAING, GUERRY & HALL,
Sols. for Def'ts.

Filing: Filed in clerk's office 2 Dec. 1901.

O. C. FULLER, *Clerk,*
By N. A. BROWN, *Deputy.*

88 In the Fifth Circuit Court of the United States for the Western Division of the Northern District of Georgia. In Equity.

COLUMBIA AVENUE SAVINGS FUND, SAFE DEPOSIT, TITLE and Trust Company
v.
THE CITY OF DAWSON, DAWSON WATER WORKS COMPANY, W. B. Cheatham, as Mayor; J. G. Dean, J. S. Lowrey, Chas. Duebler, F. M. Jennings, F. Nasworthy, F. M. McNulty, as Aldermen; John Seay, as City Marshal, and A. J. Baldwin. } Bill.

Report of the Master under Reference.

Appearances.

For complainant—Hall & Wimberly, J. G. Parks.
For the city of Dawson—Guerry & Hall, J. A. Laing.
For the water works company—No appearance.

To the honorable the judges of said court:

A decretal order was by consent entered in the above stated cause on December 2, 1901, whereby the cause was referred to the undersigned as master, with direction to hear evidence and make
89 report "touching all matters in issue in said cause."

Pursuant to this order the taking of testimony began, after due notice to the parties, at the city of Dawson, Georgia, on the 10th day of March, 1902, and continued through the 11th, 12th and 13th days of the month. The taking of the testimony was resumed at the city of Philadelphia, Pennsylvania, on March 31st and April 1st, 1902. A large volume of evidence was submitted, the stenographic report of which covers 692 typewritten pages. At each of these hearings counsel for the complainant and the defendant City of Dawson, appeared and participated. There was no appearance of counsel for the Dawson Water Works Company.

Learned and elaborate arguments of counsel were heard by the master on April 30th and May 1st, 1902, and exhaustive briefs were submitted. Counsel were allowed further time after the argument in which to prepare and file additional briefs.

Subsequently counsel on each side asked and obtained leave to file affidavits supplementing the oral testimony already adduced.

After a careful consideration of the evidence and of the arguments and briefs of counsel, the master has arrived at his findings and conclusions, and submits to the court this his report thereof.

Statement.

The original bill was filed on May 1st, 1899, by the complainant, as trustee for the bondholders, against the city of Dawson, certain individuals in their representative capacity as officers of said city, and against the Dawson Water Works Company. The bill alleged in substance as follows:

90 The Dawson Water Works Company on September 1, 1891, created the complainant as trustee for eighty of its first mortgage bonds in the denomination of $500 each, and executed to complainant its mortgage or deed of trust, conveying as security for the payment of its said bonds, all of its real and personal property, corporate rights, franchises, privileges and appurtenances, together with all incomes, rents, earnings, issues and profits, then or thereafter payable to the company; and in particular the income payable to the said company, or to the trustee for its bondholders, in virtue of the contract with the city of Dawson in that regard. Said bonds, aggregating $40,000 in amount, dated September 1, 1891, and payable September 1, 1916, with interest at the rate of 6 per centum per annum, payable semi-annually, were duly issued and sold in open market to *bona fide* purchasers for value. The bonds were issued and sold in order to procure the money necessary to construct and equip a system of water works, as contemplated in a certain contract between the city of Dawson and the water works company.

This contract is contained in an ordinance of the city of Dawson, acting in its corporate capacity, of February 21, 1890, whereby R. L. Bennett, his associates, successors and assigns, were to become incorporated under the laws of the State of Georgia under the name of Dawson Water Works Company, which company, within the time limited, was to construct, complete and have in operation a thorough system of water works in accordance with the specifications and the plans of the contract, and was from time to time to extend its mains and pipes and enlarge its system to meet increasing demands consequent upon the growth of the city; and in consideration of the company's agreeing to furnish a free and unrestricted use of its water for fire protection for the period of twenty years, the city of Dawson undertook and agreed to pay to the company, or to such trust company as might be chosen as trustee for the bonds to be issued, the sum of $2,000 annually for the period of twenty years, such payments to be made on the first days of January and July in each year. The ordinance provided that a tax sufficient to pay such rentals should be annually levied, specified the number of fire plugs to be established, and limited the price to be charged to private consumers.

91 The city of Dawson, on June 11, 1886, submitted to the qualified voters of the city (after publication of notice thereof for four weeks in the newspaper in which legal notices were published) the question whether the city should incur the expense of

water works. The election was held, and more than two-thirds of the qualified voters cast their ballots in favor of incurring the expense of water works. The result of the election was declared to be in favor of water works. The contract entered into between the city of Dawson and R. L. Bennett, as above referred to, was published in full in the public gazette, and was acquiesced in by all of the citizens.

The Dawson Water Works Company was duly incorporated and proceeded to construct a complete and thorough system of water works in accordance with the specifications and requirements of the said contract. The system was fairly and fully tested by the city, and was found to satisfactorily comply with all of the requirements of the contract. The city council of Dawson on August 12, 1891, adopted a resolution declaring that after fully testing said system, it was accepted by the city as fully complying with the contract.

The water works company has continued to maintain and operate its system in full compliance with the requirements of said contract continuously from that time, and the city has continuously enjoyed the fire protection contracted for, and for that purpose has continuously used the water so often as required.

It was understood and contemplated by the city of Dawson at the time of entering into the contract, that the money required to construct the system of water works was to be procured in whole or in part by the issuance and sale of the bonds of the water company; and in order to render the bonds more salable, the city by said contract agreed and promised to pay to the trustee for the bondholders the annual rental stipulated in the contract, thus inviting investors to become purchasers of the bonds upon the faith that the city would observe its obligations as therein contained. The bonds were negotiated and sold upon the faith that the city of Dawson would pay said rentals, to be applied to the liquidation of the principal and interest of said bonds; and the proceeds of said bonds were used in the construction of the water works system.

92 After using the water without objection or complaint for several years, the city council on June 27, 1894, adopted a resolution declining to further carry out its contract with the water works company, assigning as the reason therefor that the contract created such an indebtedness as was forbidden by the constitution of the State of Georgia, and was therefore not binding upon the city. The water works company had in no way failed to comply with its contract, nor had any complaint been made as to the character of the service, the pressure, or the quantity of the water furnished.

At the time of the passage of the resolution, the city of Dawson was considering the question of purchasing the water works, and it is charged that the purpose of the city in repudiating the contract was to destroy the value of the property by withdrawing the revenues necessary to its existence, and forcing the company to sell at such price as would be satisfactory to the city.

In pursuance of this scheme on the part of the city, an equitable

petition was on June 29, 1894, brought in the State court in the name of certain tax payers against the city and the water works company, seeking to enjoin the city from paying the rentals accruing to the water works company, on the ground that the contract in that regard was void under the constitution and laws of Georgia. It is charged that this suit was instituted at the instance of the city for the purpose of having its contract with the water works company declared void. Upon the hearing, the injunction prayed for was denied and the suit was subsequently dismissed. Prior to that time the city had recognized said contract as valid and subsisting, and had levied and collected the taxes required to meet the annual rentals.

The rental accruing for the year 1894 was paid, less a deduction on account of taxes which it was claimed were due the city by the water works company as an ad valorem tax on its property therein. Since December 31, 1894, the city has refused to pay or make provision for the payment of the annual rentals due the water company under the contract.

In December, 1894, the city, through its mayor, notified the water works company that a resolution had been adopted declaring that the city would not be liable on the contract after January 1, 1895,
93 notwithstanding which the city has continuously, since January 1, 1895, availed itself of the fire protection afforded by the water works company, thereby intending to take the benefit though declining to carry out the obligations of the contract. The public ordinances of the city providing for the use of the water by the fire department were never repealed; the fire companies were not forbidden to further use the water; and no other means of fire protection was provided by the city. Apparatus was furnished by the city to its fire department for the use of the water, and members of the fire companies were given tax exemptions by the city in consideration of their services as firemen. The mayor and members of council, as well as other citizens, subsequently assisted in the use of the water on the occasion of various fires.

The water works company declined to acquiesce in the repudiation of the contract by the city, and gave notice that it would continue to furnish water with the required pressure for the use of the city for fire protection. The water works company has observed the requirements of the contract, has maintained the pressure called for, and has furnished the city at all times with the free and unrestricted use of its water in cases of fire.

The water works company has at all times held itself in readiness to furnish the water contracted to be supplied in lieu of city taxes to all municipal buildings and for the fountains as specified, notwithstanding which the city of Dawson has assessed, levied and attempted to collect municipal taxes against the company for the year 1895. An execution for such taxes has been issued and placed in the hands of the city marshal for collection by seizure and sale of the water works property.

The city of Dawson called an election for December 12, 1894, to determine whether the city should issue bonds in the sum of $35,000, to erect or buy water works and electric lights for the city. The result of the election was declared by council to be in favor of issuing the bonds. Bonds in the amount of $10,000 have been, pursuant to said election, issued and sold, and with the proceeds the city has erected an electric light plant. The remainder of said bonds, amounting to $25,000, have not been sold, but it is charged to be the purpose of the city to invoke a ruling of the court whether its
94 contract with the water works company is binding and if the decision should be favorable to the city, thereafter to sell the bonds and with the proceeds erect its own system of water works, and dispense with the water supply and fire protection which the city enjoys under its existing contract. It is charged that it was the plan and purpose of the city, while intending to repudiate the contract, nevertheless to continue to use the water and enjoy the fire protection thereby afforded until such time as it could sell its bonds and erect its own water works. The supreme court of Georgia having decided that the contract in question created a debt, and as such was forbidden by the State constitution, the city of Dawson has determined to sell its said bonds and is now engaged in an effort to procure a sale thereof for the purpose of erecting a system of water works, in violation of its contract and in total destruction of the rights of the water works company and the holders of its bonds.

The water works company has no property save its water works plant and the value of its contract with the city of Dawson. Other than from these sources it has no means with which to pay operating expenses and the interest and principal of the bonds. The abrogation of its contract with the city would result in the almost complete destruction of the value of the property of the company. If the city of Dawson should be permitted to erect and operate its own system of water works, the company would be in no position to compete successfully for the patronage of private consumers.

The water works company, recognizing the right of the complainants to pay the rental due and to become due under its contract with the city, in order to protect the rights of the bondholders, has yielded to complainant's demand that it shall in future have the exclusive right to collect from the city of Dawson all rentals accruing under the contract for the year 1896, and subsequent thereto; of which the city has been duly notified and payment of rentals has been demanded.

The bonds issued by the water works company were in the first instance sold to the American Pipe Manufacturing Company, a New Jersey corporation. The latter company sold all of its bonds in open market for value, and the same are now owned by a
95 number of different persons. The American Pipe Manufacturing Company is largely engaged in the construction of water works and frequently receives in payment bonds of the companies for whom the works are constructed, and consequently has

frequent occasion to negotiate and sell such bonds, and is interested in seeing that the obligations thereof are duly protected.

At the request of the water works company, the pipe manufacturing company, in order to save the water works plant from foreclosure and sale, has paid the interest falling due on the bonds up to and including that due on March 1, 1899. These payments were made under an agreement that the pipe manufacturing company should be subrogated to the rights and remedies of the original holders of the interest coupons. Complainant asks leave to repay the pipe manufacturing company the moneys thus expended, if there should come into its hands a surplus sufficient for the purpose over and above the payment of accruing interest on the bonds, and the creation of a sinking fund to be used in discharge of the principal of the bonds.

The bill prays for an injunction against the City of Dawson restraining the erection, installation or operation of any system of water works in and for said city; or from entering into any contract with any other person for the construction, operation or use of any system of water works; or for the supply of water for fire protection in violation of the contract of the Dawson Water Works Company with the city; or from issuing and disposing of bonds; or from paying out any money, or incurring any obligation, or entering into or carrying out any contract for the creation of a system of water works other than that existing with the Dawson Water Works Company.

It is further prayed that the court will by injunction preserve the sanctity and integrity of the contract between the City of Dawson and the water works company, and that said contract be de-
96 creed to be valid and mutually binding upon the parties thereto; that the said contract be required to be specifically enforced; that the complainant may recover from the city, in trust for the benefit and use of the bondholders, the rentals due by the city for the use of the water for the year 1896 and succeeding years; and for general relief.

Attached to the bill as exhibits are the mortgage or deed of trust referred to, and the ordinances of the city creating the contract between the parties. Upon this bill a rule *nisi* was duly issued and served, and a temporary restraining order was granted.

On June 26, 1899, prior to the hearing of the rule, the complainant, by leave of the court, amended its bill of complaint, alleging that the ordinance of the city of Dawson repudiating its contract was an attempt to impair the obligation of the contract and destroy the value of the property of the water works company, in violation of the Constitution of the United States; that the ordinance of said city of October 4, 1894, ordering an election for the purpose of determining whether the city should issue bonds for the purchase or erection of a system of water works and an electric light plant; and the ordinance of November 5, 1894, declaring the result of the election held under the prior ordinances; and the refusal of the city to levy a tax for the purpose of paying the rentals due the water com-

pany, are likewise in impairment of the obligations of its contract with the water works company, and in violation of the Constitution of the United States.

It is further alleged that such ordinances and conduct on the part of the city, if given effect, will deprive the holders of the bonds of the water works company, as well as the water works company itself, of their property without due process of law, in violation of the Federal Constitution. The other matters contained in the amendment are not material to be now referred to.

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In answer to the rule, the city of Dawson objected to the jurisdiction, on the ground that after arranging the parties according to interest, the requisite diversity of citizenship did not exist. The city further answered denying the material allegations of the bill, and contending that the alleged contract between the city and the water works company, was utterly void under the constitution and laws of the State of Georgia, and had been so declared by the supreme court of the State of Georgia in the case of City of Dawson *v.* Dawson Water Works Company, 106 Georgia, 696. The answer of the city is hereinafter more fully referred to.

The cause came on to be heard under the rule before Circuit Judge Pardee, whereupon the court, after considering the evidence and the argument of counsel granted on September 16, 1899, an order for injunction *pendente lite* as prayed in the bill, and further ordered that the defendants might apply to the court at any time after thirty days from the date of the order for a test of the ability of the Dawson Water Works Company to perform its obligations in regard to the furnishing of the water to the city of Dawson for municipal purposes and fire protection, according to the letter and spirit of its contract; and upon such application the court would order a test and trial of the same by experts, under the direction of a master, and take such action upon the master's report as equity might require. The injunction as ordered was duly issued.

From this order granting an interlocutory injunction, an appeal was duly prosecuted to the circuit court of appeals. That court dismissed the appeal without considering the merits of the controversy, upon the ground that an appeal will not lie to a circuit court from an order granting an interlocutory injunction in a case involving the construction and application of the Constitution of the United States. (City of Dawson *v.* Columbia Avenue, &c., Company, 102 Federal 200.)

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To the original bill the defendant City of Dawson demurred for want of jurisdiction in the court, on the ground that after arranging the parties according to interest the requisite diversity of citizenship did not exist, and on the further ground that no Federal question was involved. The defendant also demurred to the bill for want of equity, on the ground of an adequate remedy at law. After argument of counsel the demurrer was overruled on July 8, 1901, "the court considering the law and equity to be with the complainant and the demurrer to said bill not well taken."

Thereafter on the 3rd day of August, 1901, the City of Dawson and the defendants, who were being sued in their representative capacity as officers of said city, filed their answer to the bill as amended. The answer is in substance as follows:

The Dawson Water Works Company, a Georgia corporation, is the real complainant in the litigation, and the bill has been brought in the name of Columbia Avenue Trust Company as complainant, with the water works company as defendant, collusively and for the purpose of conferring jurisdiction upon the Federal court; and for the further purpose of avoiding the judgment of the supreme court of Georgia declaring the contract involved to be invalid. Wherefore it was prayed that the court dismiss the bill for want of jurisdiction.

Further answering, the defendants say that under the constitution and laws of Georgia the alleged contract between the water
99 works company and the city is absolutely void *ab initio*, because expressly prohibited. On the 14th day of March, 1899, the supreme court of Georgia, in the case of Dawson Water Works Company *v.* The City Council of Dawson, adjudged that under the constitution and laws of Georgia and its settled public policy, the said contract was void *ab initio*, and that complete performance on the part of the water works company did not estop or prevent the city from pleading the illegality of the contract. The complainant, Columbia Avenue, &c., Trust Company, is a mere privy and assignee of the cause of action involved in the decision by the supreme court of the State, and has become such since said decision. The defendants plead that all of the questions and issues now made in the bill as amended are *res judicata*, and they pray the court to follow the judgment of the supreme court of the State. The answer contains a general denial of the material allegations of the bill.

The election held by the city in 1886, to determine whether the city should incur the expense of water works, was void for uncertainty, and has been so declared by the supreme court of Georgia; and was insufficient to predicate the contract in question or any legal contract. It is admitted that in June, 1894, the city repudiated and renounced the alleged contract with the water works company. Since the year 1894 the city has not in its public capacity used or authorized the use of any of the water of the water works company. If any of the city officials have used the water on occasions of fire, it was in their capacity as private citizens, acting in an emergency.

It is denied that the complainant sustains any contractural relation to the city with reference to the subject matter of the suit; or if such relation did exist, the contract being totally void, could not be valid for the benefit of any party thereto, or of third persons whose rights depended upon those of the parties. Defendants deny any improper motive in repudiating the contract, and deny any effort or intention to impair the value of the property of the water company or force the company to sell to the city for less than its value.

Refusal to pay water rentals for the year 1895 and succeeding

years is admitted. It is averred that during these years the
100 system of water works has been defective, insufficient, unreliable and almost unserviceable as a means of protecting the city from fire; the required amount of pressure did not exist; the system was not kept in proper condition for prompt and effectual use; and was so unsatisfactory that on nearly every occasion when the citizens endeavored to use the water to extinguish fires there was a failure to obtain sufficient water under the required pressure. During these years the water company had notice and knowledge of the inadequacy and inefficiency of the system, and on one occasion, in June, 1897, on a test made by the superintendent of the company under the conditions laid down in the contract, the system failed to measure up to the standard, in that the water was thrown vertically not more than thirty feet, instead of fifty as required. The inefficiency of the system as then demonstrated had continuously existed since 1894 and up to the date of the filing of the bill.

The remission of municipal taxes, as contained in the said contract, is utterly void under the laws of the State. Since the renunciation of the contract by the city it has not used or received the water of the water company under the terms of the contract, or otherwise; and taxes upon the water company's property for the year 1895 and succeeding years are due and unpaid.

It is not denied that the city proposes to erect its own system of water works, but it is contended that under the decision of the highest court of the State it has the right to do so. It is denied that the complainant as trustee has any right to maintain this suit for the benefit of the bondholders. In reality the suit is at the instance and for the benefit of the water company, which had been allowed to collect all rentals from the city until after the litigation in the State court.

The water company has no exclusive franchise for completing, equipping and operating water works in the city, and under the constitution and laws of the State can have none; nor is the city prevented from constructing and maintaining its own system, after complying with the requirements of the law in that regard. The city and its inhabitants have suffered damage and injury by reason of the inadequacy of the present system, and the water company being insolvent, it became the right and duty of the city to
101 provide an adequate and satisfactory system for fire protection and for the health, safety and welfare of the inhabitants of the city.

It is true that the city has never complained to the Columbia Avenue Company as to the inefficiency of the water works or the character of the service, because the city did not know that the complainant was entitled to such notice, and for the further reason that the city having declined to carry out the alleged contract and to pay the water rental accruing thereunder, considered that it had no right thereafter to complain to anyone touching the inefficiency of the service.

Not only was the water furnished by the water company insufficient to afford the fire protection contemplated in the contract, but it was impure, unwholesome and unfit for domestic use and sanitary purposes. At times the water was so muddy it was unfit for drinking or bathing purposes, and on several occasions was so thick with mud that a flow could not be obtained for use in extinguishing fires.

The sources of water supply were designated by resolution of the city council of March 14, 1891. The water company has not derived its supply solely from these sources, or either of them, but has furnished water mingled with surface and branch waters, and from the waters washing from the adjacent hills and fields. This water it has allowed to accumulate in swampy places covered with undergrowth and woods. The water so obtained was furnished without being filtered and was loaded with mud and filth.

To this answer replication was duly filed, and at this stage of the cause reference was made to the master.

Findings of Fact.

I.

The city council of Dawson by ordinance of May 10th, 1886, directed an election to be held on June 11th, following, at which the question of incurring the expense of water works should be submitted to the qualified voters of the city. At this election
102 the ballots cast were for "water works" or "no water works."

The result of the election was in favor of water works, and this result was declared by the city council on July 18th, 1886. (Record, p. 33.) Following this election the officials of the city made some effort to secure a system of water works, but no substantial results were accomplished.

No definite plans for a system of water works had been developed, nor were any negotiations looking to a particular contract either pending or in contemplation at the time.

Nearly four years thereafter the city entered into the contract with R. L. Bennett which forms the subject of this suit. Neither in the negotiations leading up to the contract, so far as the evidence discloses, nor in the contract itself is there any mention of or reference to this election as furnishing authority for the contract or as an inducement thereto.

I therefore find as a matter of fact that at the time of the contract the result of the election of June 11, 1886, was not in contemplation of the parties; and that the said election constituted no authority for entering into the contract on the part of the city.

II.

The contract entered into between R. L. Bennett and the city of Dawson is in the form of an ordinance, adopted February 21, 1890, and is in substance as follows:

Section 1 grants to R. L. Bennett, his associates, successors and assigns, who are to become incorporated as the Dawson Water Works Company, the exclusive right and privilege for the period of ninety-nine years, of constructing, maintaining and operating a system of water works for the purpose of supplying the city
103 and its inhabitants with water for protection against fire and for domestic, sanitary and other useful purpose.

Section 2 confers upon the company the exclusive right and privilege of excavating and laying water pipes and mains along the streets and avenues of the city, as then open or as thereafter extended.

Section 3 gives the right to erect buildings, tanks and other structures, and make necessary improvements on lands owned or controlled by the city, excepting its public squares.

Section 4 requires the company to complete and have in operation within eighteen months a complete and thorough system of water works, to consist of four and 8/10 miles of pipe of 4, 6 and 8 inches in diameter, with a reservoir of not less than 40,000 gallons capacity "and of sufficient height to produce a pressure on the mains such that from any hydrant located on the principal streets a stream of water will be projected fifty (50) feet vertically in still air through one hundred feet of fire hose with a one-inch nozzle attached." The company is required to continue during its existence to furnish a sufficient supply of water for the purposes named, unless prevented by unavoidable and providential cause, in which event it should be allowed a reasonable time within which to make repairs, after which, should it fail to furnish such supply of water, its franchise from that fact should be forfeited.

Section 5 provides that the company shall from time to time extend its mains and enlarge its system to meet the increasing demands consequent upon the growth of the city.

Section 6 recites that in consideration of the company guaranteeing to the city for the period of twenty years, and as long thereafter as the company should operate the water works, a free
104 and unrestricted use of the water for fire protection; and agreeing to establish at convenient places, not exceeding fifty, fire plugs of approved pattern, to be increased in number as the city grows in population; and to furnish, for fire protection only, water to fill the public cisterns, the city obligated itself "to pay to the said company or to such trust company as the Dawson water works may elect or decide upon as their trustee for their bonds the sum of two thousand ($2,000) dollars annually for twenty years" in semi-annual payments of $1,000 each on the first day of January and July in each year, and in case the city should from lack of

funds or other cause fail to make such payments on the days named, it agreed that warrants should be issued on the city treasurer in favor of the company for the amount due.

Section 7 required the city council to make provision each year for the payment of the stipulated rental by levying a tax sufficient for the purpose upon the taxable property in the city.

Section 8 limited the charges to private consumers of the water, and prescribed a schedule of maximum charges for various uses.

Section 9 contains the agreement that in consideration of water to be furnished the public municipal buildings and two public fountains "the city of Dawson hereby obligates itself to remit to said company, its successors and assigns, any and all license fees, taxes, dues and charges which may at any time hereafter be levied or assessed by said city against said company or upon the plant to be used in said water works system."

105 Section 10 gives the assent of the city to the charter that may be obtained by the water works company conferring upon it the exclusive franchise to construct, maintain and operate a system of water works in the city.

Section 11 declares, "That the provisions of this ordinance shall be mutually binding upon the city of Dawson and R. L. Bennett and associates, and the company be organized by them in pursuance of the provisions thereof, and it shall have the force and effect of a contract between the respective parties as fully and completely as if it were drawn in that form and signed by the contracting parties. (Record, pages 9–14.)

I find that the ordinance as above recited and referred to was accepted by R. L. Bennett, and constituted the contract as between him and the city of Dawson. This contract and the franchises therein granted were subsequently, on March 17th, 1891, transferred and assigned by R. L. Bennett to the American Pipe Manufacturing Company; and by that company was on August 20th, 1891, transferred and assigned to the Dawson Water Works Company, which company had become incorporated under the laws of the State of Georgia.

III.

I find that the city of Dawson had express notice that bonds were to be issued and sold for the purpose of procuring the money with which to construct the water works plant, and that the city acquiesced in this arrangement. In the original ordinance of February 21, 1890, creating the contract between the parties, the city agreed to pay the water rental to the water works company, or to such trust company as the water works company might elect or decide upon as trustee for their bonds. (Record, page 11.)

106 At a meeting of the city council held on March 23d, 1891, a communication was received from the American Pipe Manufacturing Company stating that it had purchased the franchises of R. L. Bennett to build water works in the city, and asking for an

extension of sixty days to begin the work in order to have an opportunity to market bonds. The council adopted a resolution granting an extension of sixty days as and for the purpose requested.

IV.

The city designated the source from which water was to be taken by the water works company, and declared by resolution of March 14th, 1891, that either or all of the sources therein specified should be accepted as supply for water to fill the contract and franchises granted R. L. Bennett and his associates. Samples of water from each of these sources had been taken by the mayor of the city and forwarded to the State chemist for analysis. After analysis the chemist reported that each of these waters were pure and safe, and one (taken from a source subsequently adopted) was reported to be "clear and odorless with a faint yellowish brown color due to vegetable matter in solution. On standing traces of organic sediment are deposited. Organic impurity very slight and mainly vegetable. A perfectly pure and safe water." On March 14th, 1891, the mayor wrote the American Pipe Manufacturing Company enclosing copies of these analyses, together with copy of the resolution of the city council designating the source of supply. An official of the pipe company visited Dawson, inspected the sources of supply pointed out, and selected those which were deemed sufficient for supplying the requisite quantity of water.

107

V.

The system of water works as contemplated was constructed by the American Pipe Manufacturing Company. After its completion the system was tested by the city in order to ascertain if it came up to the requirements of the contract. After making this test the city, on August 12th, 1891, executed a formal acceptance in writing and caused to be entered upon the minutes of the council a declaration accepting the system of water works as fully complying with the contract in all particulars. (Record, page 33.)

VI.

The Dawson Water Works Company on September 1st, 1891, caused to be issued 80 first mortgage bonds in the denomination of $500 each, aggregating the sum of $40,000, payable on the 1st day of September, 1916, with interest at the rate of 6 per cent. per annum, payable semi-annually. Payment of these bonds was secured by a mortgage to the complainant Columbia Avenue Company, as trustee, of even date, conveying all the real and personal property of the water company, including its corporate rights, franchises and privileges then owned or thereafter to be acquired, together with any and all income then or thereafter payable to the water company under any agreement made between the company and the city of Dawson, or payable under any ordinance of the said city.

Before accepting this trust the president of the Columbia Avenue Company visited Dawson in person, inspected the system, examined into the contract with the city, and satisfied himself that proper support existed to enable the water works to be successfully
108 operated. The entire issue of bonds was accepted by the American Pipe Company in payment for its work and material in the construction of the water works system. All of the bonds were subsequently sold to *bona fide* purchasers for value at prices varying from 92½ to 100, the aggregate derived from the sale of the bonds amounting to $37,927.23. These bonds are now owned and held by various persons, whom I find to be *bona fide* purchasers for value.

After the installation of the system and its acceptance by the city as fully complying with the requirements of the contract, the water works were for several years operated to the mutual satisfaction of the parties. During this time the city promptly paid the rentals as they fell due, and appears to have made no complaint of any kind, either with reference to the quality or quantity of water or the efficiency of the service. In May, 1894, the city instituted negotiations looking to a purchase of the water works system. These negotiations resulted in a failure to agree. Early in July the proposition of the water company was formally declined by the city and all negotiations were terminated.

In the meantime certain tax-payers of the city filed an equitable petition against the city to restrain it from paying water rentals, on the ground that the contract with the water works company was *ultra vires* of the city and void. The injunction prayed for was denied and the bill was dismissed.

On June 27, 1894, the city council adopted a resolution declining to carry out the contract with the Dawson Water Works Company, and providing for the appointment of a committee to make such arrangements as would be satisfactory to the council and to the water works company. This resolution was duly communi-
109 cated to the Dawson Water Works Company, which declined to acquiesce in the abrogation of the contract. The city paid for the use of the water for the remainder of the year 1894, less a deduction claimed to be due the city on account of taxes; and on December 14, 1894, notified the water company that unless a new agreement could be reached between them as to the subsequent use of the water for one year from January 1, 1895, the city would not be liable under the contract after the date named. The water company declined to enter into a new agreement, insisting upon the validity of its existing contract, and notifying the city that it would continue to supply the water and maintain the service as in the contract required.

During the year 1895 the water company continued to maintain and operate its system and furnish water for the uses of the city. Only one fire occurred during the year 1895. At this fire water from the mains and plugs of the water company was used. After

the expiration of the year, the city declining to pay the water rentals, the water company brought an action at law for recovery in the superior court of Terrell county. The superior court directed a verdict for the water company. On writ of error the supreme court of the State reversed judgment of the court below, and declared that while the city might be liable from year to year for the water used under the contract for the particular year, the contract as to future years created an indebtedness such as is forbidden by the constitution of the State, and was for that reason invalid and not binding upon the city. This decision and its effect is hereinafter more fully discussed.

The water has since been continuously used on the occasions of numerous fires and whenever so required. The city claims
110 that notwithstanding that its officials participated in this use of the water, their action was that of any citizen in an emergency, and was not authorized by the city in its corporate capacity.

I find that the city fire organization was maintained during the years following 1894 as it was in preceding years. While at times this organization was not in an efficient state, it was never disbanded. The city continued to furnish hose and fire apparatus and to grant to the members of fire companies exemption from municipal street taxation. No other means for fire protection was afforded by the city, so that it must have been recognized that in any emergency of fire resort to the use of the water of the water works company was necessary and inevitable. The city did not forbid the use of this water by its fire department, and must have known that tt was being continuously so used. In 1898, prior to the filing of this bill, the city brought its fire department up to a higher state of efficiency with a paid chief at its head.

I accordingly find that notwithstanding the city had repudiated the contract, it has continued to enjoy the fire protection afforded by the waterworks company and to use the water for that purpose on every occasion, in the same manner and to the same extent that it did prior to its repudiation of the contract.

VIII.

The source of water supply adopted by the water company from among those designated by the city consisted of a running stream, into which directly flowed the water of what is known as Dunn's spring, some four hundred yards above the take-in of the water
111 company. These waters were among those analyzed by the State chemist, and by him pronounced safe and pure. The water shed does not cover an extended area. The stream above flows through land which is more or less marshy, and upon which there is considerable vegetable growth. The surface water from adjoining hills on one side of the stream flows in above the point of supply. On the crest of these hill- are several small residences, the washings from whose premises flow into the stream. There is also on the

water shed a scaffold, which has been used from time to time for the slaughtering of cattle in a small way. The stream from which the water supply is derived is not protected from these surface washings by means of dikes or other devices. The condition of the water shed is substantially the same now as it was at the time of the selection and as it has been since. The evidence does not disclose when the slaughtering of cattle began, or how extended it has been. The water is not filtered, but is taken directly from the stream and pumped to a standpipe or reservoir in the city, from which it is distributed by gravitation through mains and pipes to consumers.

I find from the evidence that at certain seasons of the year the water is safe and pure, as shown by the analysis of the State chemist; at other seasons, during periods of continuous rainfall, the water is muddy and must to some extent be contaminated by reason of the surface washings from the water shed as described. It was disclosed in the evidence that an analysis of the water had been made at the instance of the city or some of its citizens, but this analysis was not offered in evidence, nor was any expert evidence as to the quality of the water introduced, excepting the analysis of the State chemist as above referred to.

112 The General Assembly of the State of Georgia passed an act, approved September 7, 1891, for the protection of the water supply of the water works for the city of Dawson. By this act it was made unlawful to obstruct or interfere with the flow of the stream, or pollute or contaminate in any way or by any means the water of the stream or water shed, so as to affect in any degree the quality or purity of the water. It was made unlawful to place or deposit any dead animal or vegetable matter in the swamp bordering on and surrounding the stream, its springs and branches, so as to affect the purity and quality of the water. The violation of these provisions was declared to be a misdemeanor. The police supervision of the marshal and policemen of the city of Dawson was extended over the water shed, and the officers were empowered to make arrests therein for violation of the provisions of the act. The ordinance of the city of Dawson made it the duty of the mayor to appoint three members of the council, whose duty it should be to superintend the water works and water supply of the city, and to see that the owners of the water works company complied with their obligations in furnishing water to said city and private individuals. (City Code, paragraph 242.)

IX.

The water company erected a reservoir exceeding in capacity that required by the contract. The height of this reservoir from its bottom to the surface of the earth below was 65 feet. Upon a test by the city it was ascertained and declared that the system met with the requirements of the contract, and I therefore find that the reservoir was of the prescribed height and capacity. Much evi-

113 dence was introduced and offered to show that sufficient pressure had not constantly been maintained. It appears

that on one occasion the reservoir was found to be empty, but this occurred shortly after the construction of the water works and before the repudiation of the contract by the city, and is therefore not material to be considered in the present case. At times the reservoir leaked. On one occasion the local superintendent of the water company tested the pressure from a point on what is known as an end pipe. The water failed to reach a height of fifty feet vertically. It was shown that this test was a voluntary act of the local superintendent, without notice to the officers and owners of the water works company or to the city. Gauges indicating the height of the water in the standpipe, and the consequent pressure, were placed at the pumping station of the water company and also in the engine house of the city fire department. Excepting on rare occasions the reservoir was kept supplied with water sufficient to produce the required pressure. No complaint concerning the character of the service or the amount of the pressure was made to the water company until after the institution of the present suit. The water company has since erected a new reservoir of more than double the capacity required in the contract and of a greater height than the first reservoir. Since the erection of this new reservoir there has been no complaint or question as to the pressure.

X.

In repudiating its contract with the water works company the city did not base its claim of right upon any inadequacy of supply, inefficiency of service or quality of water furnished by the water company. The system had been in operation for three and one-
114 half years, its water supply being derived then as now from the sources designated and approved by the city. During these years the surface washings from adjoining hills flowed into the stream during times of rain, and on such occasions the water was muddy. There was no request on the part of the city for the water works company to supply protection to the water shed other than as existed then and now; nor was any request made that the water be filtered, or that the water tower be increased in either height or capacity. The city predicated its right to renounce the contract upon the ground of a want of authority in the preceding administration to bind the city by such a contract, for that it created an indebtedness forbidden by the constitution of the State. The evidence makes it clear that the city was moved to this action, not only because it considered that it had the right so to do, but also because the contract was regarded as unfair and exorbitant. The facts and surrounding circumstances disclosed the evident purpose on the part of the city to either purchase the water works at a price satisfactory to it, or to make new agreements on more favorable terms for the use of the water from year to year, or to construct and operate its own system of water works. Failing to succeed in purchasing the water works, or in obtaining satisfactory agreements for the use of the

water from year to year, the city submitted to its qualified voters a proposition authorizing it to issue bonds for the construction of an electric light plant, and also for the construction of a system of water works. Of the bonds so authorized $10,000 have been issued and the proceeds used in the construction of an electric light plant; the remaining $25,000 have not been issued or sold, but the city does not deny that its purpose is to use the proceeds of these bonds
115 for the construction of a system of water works, unless it is prohibited by the court from doing so.

XI.

During the years succeeding 1895 the only water furnished by the water company for municipal public buildings was through one opening at the engine house of the fire department. The fountains mentioned in the contract to be supplied with water have not been maintained by the city.

XII.

The city levied an *ad valorem* tax on the property of the water works company for the year 1895. The amount of the tax so assessed not having been paid, the city caused a tax execution to be issued therefor, and caused the same to be placed in the hands of its city marshal for collection by process of law. Further proceedings on this execution have been temporarily enjoined by this court.

XIII.

I find that no application has been made on the part of the city to test the system of water works, as provided in the order of this court of September 16th, 1899.

XIV.

Subsequent to the decision of the supreme court in the case of City of Dawson *v.* Dawson Water Works Company, the water works company assigned to complainant the exclusive right to demand, collect and receive the water rentals to be paid by the city of Dawson, as provided in the contract.

116 XV.

I find that the revenues of the water works company from and including the year 1895, exclusive of the rentals claimed to be due by the city, have been insufficient to pay the operating expenses and fixed charges.

XVI.

I find that the American Pipe Manufacturing Company loaned to the water works company from time to time funds sufficient to meet

the accruing interest on the outstanding bonds of the water company from September 1, 1895, up to and including March 1, 1899, amounting in the aggregate to $8,560. For these loans checks were drawn payable to Dawson Water Works Company, and the proceeds deposited to its credit. The coupons as they fell due were paid by the water works company to the trustee. No other notice was given the trustee that these payments were made other than from the ordinary revenues of the water works company. The coupons thus paid and taken up by the water works company were not assigned or delivered to the pipe company. I therefore find that the transaction constituted merely a loan by the pipe company to the water works company, with no express agreement (so far as the evidence discloses) that the coupons should be assigned to the pipe company, or that it should be subrogated to the rights of the bondholders therein.

XVII.

The Columbia Avenue Company was without notice of the litigation between the city of Dawson and the water works company until after the decision of the supreme court of the State of March 18, 1899.

117 *Conclusions of Law.*

I.

To the jurisdiction.

The answer sets up an objection to the jurisdiction, on the ground that the suit is collusively brought by the complainant at the instance and for the benefit of the water works company, for the purpose of conferring jurisdiction on this court and of avoiding the judgment of the supreme court of Georgia. It is contended that the water works company is the real complainant, and that its transfer to the Columbia Avenue Company of the exclusive right to collect the water rentals from the city of Dawson was merely colorable and was intended to predicate a suit in this forum.

The only effect of such a transfer, in so far as concerns the jurisdiction, would be to create the diversity of citizenship necessary to suit in the Federal court. If the jurisdiction rests upon an independent ground, the diversity of citizenship is immaterial. The court in overruling the demurrer in this case, decided that a Federal question sufficient to sustain the jurisdiction was presented. It is therefore immaterial to inquire what motive prompted the water works company to make the assignment.

One of the grounds of the demurrer was for want of equity. The overruling of the demurrer on this ground adjudicated the right of the complainant to institute and maintain this suit. That the water works company will be benefited and that the suit was instituted at

its instance, are questions that do not concern or affect the jurisdiction of the court, and I therefore conclude that the objection to the jurisdiction is not well taken.

118 II.

On the merits.

The leading question presented in this controversy concerns the effect of the decision of the supreme court of Georgia in holding the contract to be void as between the city and the water works company, on the ground that it created an indebtedness such as is forbidden to cities by the constitution of the State.

1. The city contends that the question so involved and decided in that case is *res judicata* as against the complainant in this case. The matter is properly the subject of a plea rather than an answer; but no objection having been taken, the question will be considered as if properly pleaded.

This suit is upon a different cause of action from that in the State court. If it be treated as being between the same parties or their privies, it is well established that a right, question or fact distinctly put in issue and directly determined in the first suit cannot be disputed in a subsequent suit. Such right, question or fact is to be taken as conclusively established. The judgment, however, in another suit upon a different cause of action, operates as an estoppel only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined. Southern Pac. R. Co. *v.* United States, 168 U. S. 1, 42 L. Ed. 355; New Orleans *v.* Citizens' Bank, 167 U. S. 371, 42 L. Ed. 202; Nesbitt *v.* Independent District of Riverside, 144 U. S. 610, 36 L. Ed. 562; Cromwell *v.* Sac County, 94 U. S. 351, 24 L. Ed. 195; Wilmington & Weldon R. Co. *v.* Alsbrook, 146 U. S. 279, 36 L. Ed. 972; Keokuk & W. R. Co. *v.* Missouri, 152 U. S. 301, 38 L. Ed. 450;
Roberts *v.* Nor. Pac. R. Co., 158 U. S. 1–30, 39 L. Ed. 873;
119 Last Chance Mining Co. *v.* Tyler Mining Co., 157 U. S. 683, 39 L. Ed. 859.

If, therefore, the question of the validity of the contract was distinctly put in issue and directly determined by the supreme court of Georgia, its decision would be conclusive upon the parties to that suit and their privies.

The complainant here was not a party to the State court litigation, but it is contended that it is a privy in right and estate to the water works company, which was a party. A mortgagee is privy in estate to the mortgagor as to actions begun before the mortgage was given. As to suits subsequently begun, he is not a privy nor is he bound by judgments or decrees therein against the mortgagor, unless he or some one authorized to represent him is made a party to the litigation. Keokuk & W. R. Co. *v.* Missouri, 152 U. S. 301, 38 L. Ed. 450; Hassall *v.* Wilcox, 130 U. S. 493, 32 L. Ed. 1001; Louisville Trust Company *v.* Cincinnati, 76 Federal 296; Larison *v.* Hager,

44 Fed. 49; Southern Bank & Trust Co. *v.* Folsom, 75 Fed. 929; Central Trust Company *v.* Hennen, 90 Fed. 593.

Louisville Trust Company *v.* City of Cincinnati, 76 Fed. 296, is closely in point. Louisville Trust Company was the trustee under the mortgage to secure an issue of bonds by the Inclined Railway Company. The mortgage included franchises, rights of way and easements. Subsequently the city of Cincinnati brought suit against the railway company in the State court, in which it was decided that certain street franchises enjoyed by the railway company had expired by limitation, while certain others were void. This judgment was affirmed by the supreme court of the State. The trust company brought suit against the city in the Federal court, in
120 which suit these questions were involved. The court, after declaring the franchise to occupy a public street created such a property right as was subject to assignment or mortgage, further said that the mortgagee could not be deprived of this security by a proceeding directly impeaching its validity and duration without being made a party thereto.

Hence I conclude that the complainant in this case was not a privy of the waterworks company as to the suit in the State court so as to be conclusively bound thereby; and that the doctrine of *res judicata* does not apply to it.

2. It is insisted that the decision of the supreme court of Georgia, declaring the invalidity of the contract, will be regarded as conclusive in this forum in deference to the rule that the Federal courts will follow the construction given constitutions and statutes by the highest court of the State. The general rule is as stated, but it is subject to important limitation and exceptions. The Federal court, in construing the meaning of a State statute as to what contract is contained therein and whether the State has passed any law impairing its obligation is not bound by previous decisions in State courts, except when they have been so long and so firmly established as to constitute a rule of property; but will decide independently whether there is a contract and whether its obligation has been impaired. County of Shelby *v.* Union & Planters Bank, 161 U. S. 149, 40 L. Ed. 650; L. & N. R. Co. *v.* Palmes, 109 U. S. 244, 27 L. Ed. 922; Vicksburg S. & P. R. Co. *v.* Dennis, 116 U. S. 665, 29 L. Ed. 770; Mobile & Ohio R. Co. *v.* Tennessee, 153 U. S. 486, 38 L. Ed. 793.

In the leading case of Burgess *v.* Seligman, 107 U. S. 20–27
121 L. Ed. 359, the Supreme Court of the United States, on special consideration, distinctly stated the rule and its limitation as follows:

"The Federal courts have an independent jurisdiction in the administration of State laws, co-ordinate with and not subordinate to that of the State courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administra-

tion of the law is carried on by the State courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the State, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of State constitutions and statutes. Such established rules are always regarded by the Federal courts, no less than by the State courts themselves, as authoritative declarations of what the law is. But where the law has not been thus settled, it is the right and duty of the Federal courts to exercise their own judgment; as they also always do in reference to the doctrines of commercial law and general jurisprudence. So when contracts and transactions have been entered into and rights have accrued thereon, under a particular state of the decisions or when there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt."

The case on this point has been followed and approved in a great number of cases which need not be cited. See Bartholomew *v.* City of Austin, 85 Fed. 359.

In Spear *v.* Board of County Commissioners, 88 Fed. 749, 122 the question presented related to the validity of certain county warrants. The supreme court of the State declared these warrants invalid. The holder of other warrants brought suit in the circuit court of the United States. The circuit court of appeals for the eighth circuit declined to follow the decision of the State court, upon the ground that "decisions of State courts as to their statutes, which affect the validity of contracts between citizens of different States which were made, or under which rights were acquired, before there was a judicial construction of the statute which seemed to authorize the contracts, are not obligatory upon the courts of the United States."

The same court of appeals considered Clapp *v.* Otoe County, 104 Federal 473 in which case an action upon county bonds had been instituted. The bonds had been declared void by the supreme court of the State. The court declared the rule that "National courts uniformly follow the construction of the constitution and statutes of a State given by its highest tribunal, in all cases that involve no question of general or commercial law and no question of right under the constitution and laws of the nation." It was pointed out that the plaintiff in that case had purchased the bonds prior to the decision of the State court, without notice of any defect in their execution; that upon this purchase he entered into a contract relation with the county, and by such purchase he acquired the right, under the Constitution and laws of the United States, to have his

contract interpreted and his rights enforced in a court of the United States, and to invoke the independent judgment of that court upon the legal questions involved. The court, speaking through Circuit Judge Sanborn, said:

123 "No decision of a State court, rendered after his rights under these contracts had vested, could forestall the judgment of a national court upon these questions or deprive him of the right to invoke or relieve a Federal court of the duty to accord its independent consideration and decision of his case. Much less could the decision of a State court, which studiedly ignored the rights of innocent purchasers of these bonds and which was not rendered until 10 years after they were bought, deprive the purchaser of the right to the independent opinion of the Federal court to which he presents them."

In Louisville Trust Company *v.* City of Cincinnati, 76 Federal 296, Circuit Judge Lurton, speaking for the circuit court of appeals, forcibly declared that if the decision of the State supreme court constituted a conclusive interpretation of the contracts or ordinances under which the mortgage, easements and franchises originated, "the constitutional right of the complainant as a citizen of a State other than Ohio to have its right as a mortgagee defined and adjudged by a court of the United States, is of no real value. If this court cannot for itself examine these street contracts and determine their validity, effect and duration, and must follow the interpretation and construction placed on them by another court in a suit begun after its rights as mortgagee had accrued and to which it was not a party, then the right of such a mortgagee to have a hearing before judgment and a trial before execution, is a matter of form without substance." It was further said that the courts of the United States will not regard themselves as under any duty to conform to later State court decisions where contracts and obligations have been entered into before there has been any judicial construction, or as to which there have been conflicting decisions. In such a case

124 the Federal court will exercise its independent judgment and will not be bound to follow the opinions of the State court construing such statute rendered after the rights involved in the controversy originated.

Whether the decision of the supreme court of Georgia be regarded as in construction of the State constitution, or as relating to a question of general commercial law in defining the meaning of the word "debt," such decision is not binding upon this court unless it is in harmony with the plain language of the constitution, or the settled judicial construction thereof existing at the time the contract was entered into or the bonds issued and sold.

The Columbia Avenue Company has a sufficient interest in this controversy to raise these questions and invoke the decision of this court thereon. In the ordinance creating the contract it is expressly recognized that the water rental should be payable to the water works or to such trustee for its bonds as it might select. The Co-

lumbia Avenue Company having been selected as such trustee, became the alternate payee and occupied a contractual relation with the city. The mortgage given to secure the bonds conveyed and assigned to the trustee all of the rights and franchises of the water company, including the benefit of its contract with the city. Under this conveyance the trustee is interested in protecting and preserving the security, and to that end may institute and maintain its suit independently of the water company. Louisville Trust Company *v.* Cincinnati, 76 Federal 296; Consolidated Water Company *v.* San Diego, 84 Federal 369; Reagan *v.* Farmers' Loan & Trust Co., 154 U. S. 362, 38 L. Ed. 1014; Cumberland & Ohio R. Co. *v.* Louisville C. & L. R. Company, (Ky.) 41 S. W. 1015.

125 It therefore becomes of the first importance to ascertain the state of the law and the judicial construction thereof at the time the contract was entered into.

The provisions of the constitution of 1877 in force at the time, which bear upon the question under consideration, are as follows:

"Debt of counties and cities not to exceed seven per cent.—The debt hereafter incurred by any county, municipal corporation, or political division of this State, except as in this constitution provided for, shall not exceed seven per centum of the assessed value of all the taxable property therein, and no such county, municipality or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law; but any city, the debt of which does not exceed seven per centum of the assessed value of the taxable property at the time of the adoption of this constitution, may be authorized by law to increase, at any time, the amount of said debt, three per centum upon such assessed valuation."

Paragraph 1, section 7, article 7, constitution of 1877, code section 5893.

"City debts, how incurred.—Municipal corporations shall not incur any debt until provision therefor shall have been made by the municipal government."

Paragraph 1, section 10, article 7, constitution of 1877, code section 5897.

The question as to what created a debt within the meaning of this constitution first came before the supreme court of Georgia in the case of Hudson *v.* City of Marietta, September term 1879, 64 Georgia 286. In that case the City of Marietta exchanged an old for
126 a new fire engine, incurring an indebtedness of $3,000 on account of the exchange. The court, by two justices, declared that such a transaction created a debt within the meaning of the constitution.

The next case was that of Spann *v.* Webster County, February term, 1880, 64 Georgia 498. Webster County purchased a safe, incurring an indebtedness therefor. The court, following Hudson *v.* Marietta, declared such an indebtedness was forbidden by the constitution.

The question next came before the court in the case of Mayor of Rome *v.* McWilliams, September term 1881, 67 Georgia 106. The city levied a tax to cover an anticipated expenditure for the fitting up of municipal offices. It was alleged to be the purpose of the city to contract an indebtedness on this account. The court, speaking through Mr. Justice Speer, used the following language:

"An obligation arising under a contract on the part of a municipal corporation to pay for work when and as it shall be performed in the future, does not constitute or ripen into an indebtedness within the meaning of the constitution till at least the performance of the work. 27 Iowa 228; 17 N. Y. 110."

"If this were not so, then it would be impossible, in a majority of instances, to even contract for the most necessary public building without a prior levy and deposit of money in the treasury. The obligation to pay so far as the time of its inception as between the parties is concerned, is one thing, and an actual indebtedness within the meaning of the constitution is another. I may enter into a contract for an architect to build me a house, but if he never does the work I owe him nothing; so if I pay him as he progresses, I will not be his debtor; so if I contract to pay him when the work is done, I owe him nothing till the contract is fulfilled, and if on its fulfillment I discharge it, I cannot be said to have incurred a debt in the sense the constitution prohibits corporations from incurring."

127 Chief Justice Jackson concurred in the opinion and the reasons given therefor, and distinguished the case from those of Hudson *v.* Marietta and Spann against Webster County. Mr. Justice Crawford dissented, principally for the reason stated by him as follows:

"But over and above all this comes the constitution, and declares among other things that no county, municipal corporation or political division of the State, shall incur any new debt except for a temporary loan to supply casual deficiencies of revenue, without the assent of two-thirds of the qualified voters thereof.

"It is admitted that a new debt could not be incurred except as above provided. Then the question is, whether a city can levy a tax with which to pay a future liability that it could not legally incur. If the right exists to make the contract, the time when the payment is to be made is wholly immaterial; it neither enlarges the power nor changes the nature of the liability. It is the incurring a new debt, whether paid when the work is done or five years thereafter; it is a debt from the making of the bargain until paid, be that when it may.

"To say that for a new debt to be incurred, with which to build

a town hall, without first submitting it to the people, would be unconstitutional, and to say that the levy of a tax to build a town hall without submitting that to the people would be constitutional, does not seem to me to be either law or logic. This provision in the constitution was to give the tax payers the right to say whether the *the* expenditure should be made, and to require their assent before the taxes should be laid for such expenditure."

In this dissenting opinion Mr. Justice Crawford makes no reference to the cases of Hudson *v.* Marietta and Spann *v.* Webster County, nor does he appear to predicate his opinion thereon.

In the City of Conyers *v.* Kirk & Company, March term, 1887, 78 Georgia 480, it appears that the city had contracted to pur-
128 chase lamps and gasoline for lighting the streets, intending to pay cash therefor. The lamps were used by the city for a limited time and the gasoline purchase was consumed. The city declined to make payment for several reasons. In discussing the case Mr. Chief Justice Bleckley uses the following language, citing Mayor of Rome *v.* McWilliams, 67 Georgia 106, as being in point:

"The debt resulted from a breach of the contract, not from the making of it. Against paying a debt so originating, there is no constitutional impediment. When a cash purchase is made, there is no expectation that any debt will exist, and there was no such contemplation in this case. If we take the evidence, as we do, most favorably for the plaintiffs, there was no intention that any debt should arise. It was contemplated that payment should be made as soon as the articles were delivered; and the reason indicated in the record why payment was not then in fact made was the accidental absence of the city treasurer from his office. So that this debt (and it is a debt now) became such not by virtue of making the contract, but by virtue of breaking the contract; and surely there never can be and never will be any law against paying a debt which arises from default in making a cash payment at the time the debtor ought to have made it, the cash sufficient for the purpose being then in the debtor's treasury."

Butts *v.* Little, 68 Georgia 272, was decided in 1881. It was there held that a contract by a county for the erection of a building at a specified price, payable as the work progresses and to be completed within a given time, where the amount to be paid was more than could be lawfully raised by taxation, the contract was invalid as creating an indebtedness without complying with the constitutional requirements. The court said, however, that if the parties to the contract could so modify it that the cost of the building could,
129 as it fell due, be met annually thereafter by a levy of lawful taxes, the contract would be valid. The court does not refer to the former case of Mayor of Rome *v.* McWilliams, with which case the doctrine first declared hardly seems to be consistent.

At the time that the contract under consideration was entered into, the case of Lott *v.* Mayor of Waycross, 84 Georgia, 681, had been decided by the superior court of the State and was

then pending upon writ of error in the supreme court. In this case it appeared that the city had entered into a written contract with one Albertson, whereby it was agreed that he should erect a plant and furnish a given number of electric lights for the city for the term of ten years, in consideration whereof the city was to pay the sum of $2,000 a year, payable monthly. The plaintiff filed a petition for injunction against the further carrying out of the contract on the part of the city, upon the ground that the contract was the incurring of a debt under the constitution of the State, without complying with the prerequisite submission to the legally qualified voters of the city. The court refused the injunction and the plaintiff excepted. The opinion of the supreme court is brief and direct. It was delivered by Mr. Justice Blandford, and is as follows:

"It is clear to our mind that the mayor and council of Waycross have a right to contract an annual indebtedness for the purpose of supplying lights to the town; and we do not think such a contract would be an indebtedness such as is required by the constitution to be submitted to the vote of the people of the town. Whether this contract incurs an indebtedness which is required to be submitted to the voters of the town under the constitution, is not necessary for us now to decide. It may be that the question may never arise, even under this contract, if the sum stipulated to be paid annually for the supply of lights is paid as it becomes due; and if this is a reasonable expense to be incurred by the city, and we do not see why it is not, then the question will never arise. Should the city make default of payment, then the question might arise; and it would have to be decided whether this was such a contract as imposed upon the city an indebtedness such as is contemplated by the constitution to be summitted to the people. 'Sufficient unto the day is the evil thereof.' Let the light shine in Waycross."

It is true that the court in this case does not decide whether the contract created an indebtedness, such as is required under the constitution to be submitted to the qualified voters of the town. Taking this case, however, in connection with that of Mayor of Rome *v.* McWilliams and Butts *v.* Little, it appears to sustain the proposition that a contract for supplies, or service, to be paid for at stated times as delivered or performed, does not create an indebtedness within the constitutional sense. If this be true, then upon authority of Conyers *v.* Kirk, 78 Georgia, 480, no indebtedness would arise under this contract except from a breach thereof, and against paying a debt so originating there is no constitutional impediment.

That Lott against Waycross is susceptible of this construction, is evidenced by the fact that it is cited by the Supreme Court of the United States in the case of Walla Walla *v.* Walla Walla Water Company, 172 U. S. 1—43 L. Ed. 341, to sustain the proposition that such a contract did not create an indebtedness.

Such was the state of the Georgia decisions at the time this con-

tract was entered into. The contract provided that the city should annually meet the water rentals as they accrued, by the levy
131 of an annual tax. If these water rentals should be paid as they accrued, there would never be any indebtedness, although the obligation to take the water and pay therefor would extend from year to year. As in City of Conyers *v.* Kirk & Co., 78 Ga. 480, it was contemplated that payment should be made as the service was rendered, "and there never can be and never will be any law against paying a debt which arises from default in making a cash payment at the time the debtor ought to have made it." So in Lott *v.* Waycross, 84 Ga. 681, the court said that if the sum stipulated to be paid annually for lights should be paid as it became due, the question whether the contract created a debt would never arise, inasmuch as the expense was a reasonable one to be incurred by the city. The principle in these cases was consistent with that declared in Rome *v.* McWilliams, 67 Ga. 106, and Butts *v.* Little, 68 Ga. 272, that the obligation to pay for work when and as it shall be performed in future, by an annual levy of taxes sufficient to meet the accruing installments, does not create an indebtedness within the meaning of the Georgia constitution. These cases certainly warrant the conclusion that at the time the contract was entered into with the water company, contracts of that character had not been declared invalid by the supreme court of Georgia. Indeed that court has deemed it necessary to overrule Butts *v.* Little (Lewis *v.* Lofley, 92 Ga. 804, Dawson *v.* Water Works Co., 106 Ga. 727) and to overrule, qualify or distinguish several of the other cases referred to in this report.

It cannot, therefore, fairly be said that there was such a settled course of judicial decisions in Georgia on this question, at the time of the making of the contract, as to constrain the courts of
132 the United States to follow later decisions of the State court, especially in a case where the rights of innocent third persons are concerned.

Subsequent to the making of this contract, and after the rights of the complainant and the bondholders had been acquired, the supreme court of Georgia unequivocally held that contracts of this character constituted the creation of an indebtedness within the inhibition of the State constitution. Cartersville Imp. Co. *v.* Cartersville, 89 Ga. 683; Cartersville Water Co. *v.* Cartersville, 89 Ga. 689; City of Dawson *v.* Dawson Water Works Co., 106 Ga. 696.

I therefore conclude that this court is not bound to follow the later decisions of the State court as to the validity of the contract in question, but should exercise its independent judgment with reference thereto.

3. The contract between the city and the water company contemplated that the company should maintain and perform the water service therein specified from year to year for a period of twenty years. As this service should be performed the city obligated itself to pay therefor the sum of $2,000 each year, payable semi-annually.

If the water company should fail to perform the service, the city would be under no obligation to pay. In no event was it liable to pay any installment until the service for which the payment was due had been rendered. The idea of credit did not enter into the transaction; the city did not assume to pay a present indebtedness in future installments, as would have been the case had it issued bonds payable in future. The whole purpose of the contract was to encourage the construction of a system of water works by a private corporation, and to provide for supplying the city and
133 its inhabitants with a water service in accordance with certain specifications. To this end the city gave the right to the use of its streets for the laying of mains and pipes, and agreed to pay semi-annually in each year for twenty years a stipulated sum for the free and unrestricted use of the water for fire protection. Upon the faith of these obligations on the part of the city, the water company expended a large amount of money in the construction of a system, which was tested and accepted by the city as satisfactorily complying with the requirements of the contract.

That such a contract does not create a "debt" is not an open question in this forum. Upon this point the case of Walla Walla *v.* Walla Walla Water Company, 172 U. S. 1; 43 L. Ed. 341; is conclusive. In that case the city obligated itself to pay the water company $1,500 annually in quarterly installments, for twenty-five years, for the use of the water for fire protection. The charter of the city limited the amount of indebtedness it could incur. The sum of the installments agreed to be paid for the period named, would, if treated as a debt, cause the indebtedness of the city to exceed the charter limitations.

The court, after declaring that the weight of authority, as well as of reason, favors the construction that a municipal corporation may contract for a supply of water or gas or like necessity, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the city's authorized indebtedness, says:

"There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise. There is
134 also a distinction between the latter case and one where an absolute debt is created at once, as, by the issue of railway bonds or for the erection of a public improvement—though such debt be payable in the future by installments. In the one case the indebtedness is not created until the consideration has been furnished; in the other the debt is created at once, the time of payment being only postponed.

"In the case under consideration the annual rental did not become an indebtedness within the meaning of the charter until the water appropriate to that year had been furnished. If the company had failed to furnish it, the rental would not have been payable at

all, and while the original contract provided for the creation of an indebtedness, it was only upon condition that the company performed its own obligation."

To this proposition the court cites a number of authorities, and continues:

"The obvious purpose of limitations of this kind in municipal charters, is to prevent the improvident contracting of debts for other than the ordinary current expenses of the municipality. It certainly has no reference to debts incurred for the salaries of municipal officers, members of the fire and police departments, school teachers, or other salaried employees to whom the city necessarily becomes indebted in the ordinary conduct of municipal affairs, and for the discharge of which money is annually raised by taxation. For all purposes necessary to the exercise of their corporate powers they are at liberty to make contracts regardless of the statutory limitation, provided, at least, that the amount to be raised each year does not exceed the indebtedness allowed by the charter. Among these purposes is the prevention of fires, the purchase of fire engines, the pay of firemen, and the supply of water by the payment of annual rental therefor."

The Dawson Water Works case, 106 Ga. 696, in which the supreme court of Georgia reached a different conclusion in construing the identical contract, has been carefully considered. The court recognized that its ruling on this point was "in direct conflict with a decision of the highest court in the land (the Walla Walla
135 case) as well as with the current of American authority on the subject." Its decision was based upon the public policy of the State, as read in the light of its past history. Chief Justice Simmons concurred specially, considering himself bound by a former decision in the case. (Dawson Water Works Co. *v.* Mayor and Council of Dawson, 102 Ga. 594.) He says:

"If it were an original question, I should hold, in accordance with nearly all the other courts of the Union, including the Supreme Court of the United States, when construing similar provisions of constitutions or statutes, that the making of a contract or agreement by municipal authorities for the supply of gas or water for a term of years, for a certain sum to be paid annually, is not a debt within the meaning of the constitution. It is difficult for me to understand now, after full argument and reflection, how the making of the same contract by the same authority for one year, when there is no money in the treasury to pay it and taxes are to be levied to meet the obligation, is not a debt; when if the same authority makes a contract for the same purpose for two years, or five years, it is a debt."

It is interesting to note that the supreme court of Georgia has quite recently handed down an elaborate opinion in construction of what constitutes a "debt" of a city under the constitutional provision under consideration in the instant case. In these cases, (Epping *v.* City of Columbus, and Roff *v.* Mayor of Calhoun, decided March 12, 1903) the respective cities had issued coupon bonds for

the purpose of erecting water works. The future interest, represented by coupons, if added to the amount of the principal, would exceed the indebtedness that could be legally incurred. The court said:

"The debt of a municipal corporation, within the meaning of that provision of the constitution which prohibits such a corporation from incurring a debt that exceeds 7 per centum of the as-
136 sessed valuation of all the taxable property within the municipality, is to be ascertained by adding to the principal of all outstanding indebtedness the amount of all accrued interest that may be past due and payable on the day the amount of the debt is to be fixed. In ascertaining the amount of such debt, future interest that is not due on the day it becomes necessary to fix the sum of indebtedness is not to be counted. Unearned interest is not, within the true intent and meaning of the constitution, a part of the debt of the municipality."

The court referred to the Dawson Water Works case, 106 Ga., 696, and drew a distinction predicated upon the statement that "The contract sought to be enforced in that case related to a principal liability payable in annual installments." This distinction is not apparent to the mind of the master, who finds it difficult to understand how an obligation to pay future water rentals as they accrue can differ in principle from a promise to pay future interest as it may be earned.

I conclude on this branch of the case that the contract in question did not create a "debt" within the meaning of the Georgia constitution.

4. It is contended on the part of the city that no exclusive franchise to occupy the streets and maintain a water system could be lawfully granted; and from this it is argued that the franchise may be revoked, and the city may use its streets for its own system.

The grant of a right to supply water to a city, and its inhabitants, through pipes and mains laid in the streets, upon the condition of the performance of its service by the grantee, is the grant of a franchise in consideration of the performance of a public service, and after performance by the grantee is a contract protected by
137 the Constitution of the United States. Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 43 L. Ed., 341, and cases there cited. The right of a city to do those things necessary to supply its inhabitants with water for domestic use, or to provide the city with protection against fire, is the settled law of Georgia. Dawson *v.* Dawson Water Works Co., 106 Ga. 709; Frederick *v.* Augusta, 5 Ga. 561; Rome *v.* Cabott, 28 Ga. 50; Wells *v.* Atlanta, 43 Ga. 67. As an incident to the principal undertaking the city possesses the power to grant the use of its streets, and to contract with a private company for an exclusive supply of water for fire protection.

It is unnecessary to decide whether the city may grant an exclusive franchise for a long number of years in excess of the contractual

period between the city and the water company. Should a third person in good faith seek a franchise for the use of the streets for a similar purpose, the point would be properly involved. The question now presented is whether the city can directly revoke the grant, or itself use the streets in competition with the water company, in the face of its contract with the water company. The contract does not in terms express an agreement that the city will not, during the life of the contract, erect its own system for the purpose of supplying its inhabitants with water; but it can hardly be doubted that such is the fair implication and reasonable intendment of the contract. The city having induced the expenditure of money on faith of the promise that it would grant the exclusive use of the streets for the laying of pipes and mains by the water company, and having contracted to pay for the use of water for fire protection for a term of years, will not be permitted in equity to disregard its agree-
138 ments by itself entering into ruinous competition with the other party before the expiration of the contractual term. Southwest Missouri Light Co. *v.* City of Joplin, 101 Fed. 23. Walla Walla *v.* Walla Walla, 172 U. S. 1, 43 Law Ed. 341.

I conclude that the city may not, prior to the expiration of the term for which it contracted for a supply of water for fire protection, directly revoke the grant of the franchise for the use of its streets by the water company, or indirectly impair or destroy the value of the franchise by itself entering into competition with its grantee. To this extent the right is protected by the obligation of the contract entered into. St. Tammany Water Co. *v.* New Orleans Water Co., 120 U. S. 64; 30 L. Ed. 563; Louisville Gas Co. *v.* Citizens Gas Co., 115 U. S. 683; 29 L. Ed. 510; Bartholomew *v.* City of Austin, 85 Fed. 359.

5. I have found that during periods of continuous rainfall the water supplied is muddy and to some extent contaminated by reason of the surface washings from the water shed. I have also found that at times the reservoir leaked, and that the required pressure was not at all times maintained.

The quality of the water is the same as it was during the years the city accepted it as satisfactory. The water shed and its condition was substantially the same then as now. There is no requirement in the contract that the quality of the water should be other than that furnished in its natural state from the sources of supply designated and accepted by the city. It was not required that the water should be filtered, or otherwise rendered more fit for domestic use. An act of the General Assembly made it a misdemeanor to con-
taminate the water shed so as to affect the quality and purity
139 of the water; and the police supervision of the city was extended over this territory. An ordinance of the city directed the mayor to appoint a committee whose duty it should be to superintend the water works and water supply of the city, and see that the water company complied with their obligations in furnishing water to the city and private consumers.

Prior to the repudiation of the contract by the city, no complaint as to pressure or quality of water had been made. No objection of any kind had been presented, and the city seems to have been satisfied with the service and the quality of the water. At no time since has any complaint been made, until the filing of the answer in this case. Within a reasonable time thereafter the water company erected a new stand pipe, of larger capacity and greater pressure, which completely remedied the occasional lack of pressure complained of.

At no time has the city filed formal complaint, specifying the grounds of complaint, or called for a test, or given the water company an opportunity of remedying defects, if such existed. It repudiated the contract and refused to pay the water rentals as they fell due, thus depriving the water company of a large part of its revenue; nevertheless, it continued to receive the benefits of the contract.

In circumstances such as these, the city cannot invoke a forfeiture, nor can it plead the facts as a defense to the right of the complainant to relief. Pikes Peak Power Co. *v.* City of Colorado Springs, 105 Fed. 1 (15). Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341.

6. The contract, among other things, provided that in consideration of water to be furnished the public municipal buildings,
140 and two public fountains, the city obligated itself to remit to the water company any and all license fees, taxes, dues and charges which might any time be levied or assessed by the city against the company or its plant.

The city levied an ad valorem tax on the property of the water company for the year 1895, caused execution to be issued therefor and placed the same in the hands of its marshal for collection. Further proceedings on this execution have been temporarily enjoined by this court.

The complainant contends that this agreement is not to be construed as an exemption from taxation, but that it stipulates for a service that should be received in lieu of taxes, and as a full and fair equivalent therefor. It is urged on the part of the city that the stipulation is an exemption from municipal taxation, or at least a commutation of taxes, and as such void under the constitution and laws of Georgia. I think it clear that the agreement is to be construed as in commutation of city taxes. Cooley on Taxation, 2d Ed. 234.

License or occupation taxes may be commuted by a city; but under the constitution and laws of Georgia, as uniformly construed by the supreme court of the State, there can be neither exemption from, nor commutation of, taxes on property.

The language of the constitution, paragraph 1, section 2, article 7 (Code 5883), is as follows:

"All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the ter-

ritorial limits of the authority levying the tax, and shall be levied and collected under general laws."

Par. 4 (sec. 5886) declares that all laws exempting property
141 from taxation, other than certain enumerated property, shall be void.

Under these constitutional requirements it has been held by the courts that property cannot be classified for the purposes of taxation, nor can taxes on property be commuted, nor any rule of taxation applied excepting that laid down; that is to say, a strict ad valorem tax on all property subject to be taxed within the taxing district. These cases are so numerous and uniform it is deemed unnecessary to cite them.

At the time the contract under consideration was entered into there was no case qualifying the rigid doctrine as above expressed. In 1892, however, the supreme court of the State, in the case of Cartersville Gas Company *v.* Mayor of Cartersville, 89 Ga. 683, held as follows:

"While a city cannot exempt a gas company from municipal taxation, it can contract to pay for gas a stipulated sum per lamp, and in addition thereto, a sum for all the lamps supplied equivalent to the amount of taxes imposed upon the company, provided this additional sum is a fair and just allowance to compensate for the actual value of the light service, and the stipulation is *bona fide* and not in the nature of an evasion of the law prohibiting exemption from taxes."

At the same term, the court held in the case of Cartersville Water Works Company *v.* Mayor of Cartersville, 89 Ga. 689, that a city had no power to exempt the property of the water company from municipal taxation by contract, and the attempt to grant such exemption was not effectual. The company could neither take the exemption by way of gratuity, nor purchase it by way of commutation.

In that case, the contract entered into between the city and the water company provided that the water company should erect
142 a system of water works and supply with water for fire purposes a certain number of hydrants at a given price; also to supply with water for the payment of city license and taxes for the first ten years of this contract two drinking fountains, with quarter inch openings of continual flow for man and beast, at such places on the mains as designated by the council. Subsequently, the city levied an *ad valorem* tax on the property of the water company. The agreement above recited was pleaded as against this tax levy. The court held the agreement void as being an exemption or commutation of taxes.

The facts in that case are very similar to those in the instant case. In subsequent cases the court has uniformly held that no escape can be had from the burden of an *ad valorem* tax on property, whether by contract or under legislative sanction. Atlanta National Building and Loan Association *v.* Stewart, 109 Ga. 80.

The construction thus given by the highest court of the State to its constitution, with respect to taxation, will be followed by the Federal courts. Games *v.* Dunn, 14 Pet. 322; 10 L. Ed. 476. State Railroad Tax Cases, 92 U. S. 575; 23 L. Ed. 663.

I conclude on this branch of the case that the agreement between the city and the water company provided for a commutation of city taxes, and is therefore void under the constitution and laws of the State of Georgia. The water company, however, upon an accounting, will be entitled to be paid or have credit for the value of the water actually supplied the city under this agreement.

The circuit court of appeals for this circuit, in the case of
143 Bartholomew *v.* City of Austin, 85 Fed. 359, held that where a city undertakes to exempt from taxation the property of a water company in consideration of water furnished the city, for certain purposes, if such exemption proves to be void, the company can recover for water furnished under the arrangement.

7. I have found that in point of fact the maturing interest coupons upon the bonds, from Sept. 1, 1895, to March 1, 1899, was paid by the water company from funds loaned to it for that purpose by the American Pipe Company; and that the transaction was merely a loan by the pipe company to the water company, with no agreement that the paid coupons should be assigned or that the pipe company should become subrogated to the rights of the bondholders.

Upon these facts, I conclude that the complainant is not entitled to recover in behalf of the pipe company the interest so paid. When the interest was paid to the trustee by the water company, without notice or reservation, such payment was general and the indebtedness represented by the coupons was extinguished. The trustee having once received payment cannot again enforce it, especially in the interest of one who is not a party to this proceeding, and between whom and the trustee there is no privity of contract. If the pipe company has any legal or equitable rights arising out of the transaction, it must enforce them in its own behalf in a proper suit brought for that purpose.

8. The right of the complainant to maintain this suit, in so far as concerns the jurisdiction of this court both as a court of equity and as a court of the United States, has been adjudicated on demurrer. The relief to which the complainant is entitled under the facts of the case remains to be considered.

144 The obligation of a contract may be impaired by subsequent judicial decisions, as well as by subsequent legislation. Butz *v.* City of Muscatine, 8 Wallace, 575; 19 L. Ed. 490.

An ordinance of a city denying liability on a contract with a water works company is legislation affecting the obligation of the contract under the Constitution and laws of the United States; and where the city has held an election to authorize an issue of bonds to buy or construct water works of its own, the water company is entitled to maintain a suit for equitable relief in advance of actual

proceedings by the city to impair the company's rights under the contract. Vicksburg Water Works Co. *v.* Vicksburg, 185 U. S. 65; 46 L. Ed. 808; Los Angeles *v.* Los Angeles City Water Company, 177 U. S. 558; 44 L. Ed. 886.

The defendant, City of Dawson, has renounced and repudiated the contract with the water company as being void, and in this it has been sustained by the supreme court of the State. The qualified voters of the city have, at an election held for that purpose, authorized the city to issue bonds for the construction of water works to be operated by the city. These bonds have been issued, and would have been sold but for this litigation. I conclude that these facts, as well as the other facts found, entitle the trustee to equitable relief, and bring the case within the rule of law expressed.

This suit is proceeding in the name of the trustee as complainant, for the benefit of bondholders and in order to protect the security for the bonds. An essential part of this security consists in the contract by the city for payment of water rentals as the service should
145 be performed by the water company. The trustee was, under the contract, made an alternate payee; its right to collect the water rentals upon default of payment of interest by the water company was confirmed in the mortgage given to secure the bonds, and the exclusive right to make such collection has been assigned by the water company, after default, to the trustee. It follows that the trustee has the right to enforce the performance of these obligations in this suit. A court of equity having obtained jurisdiction of the parties and of the subject-matter will make its jurisdiction effectual for complete relief, and in such suit will enforce a contract between the city and the water company made prior to the issuance of the bonds, under which contract the city agreed to pay hydrant rentals to the mortgage trustee, for the benefit of the bondholders. Fidelity Trust & Guaranty Company *v.* Fowler Water Company (113 Fed., 560), and cases there cited on pages 571 and 572.

The trustee is entitled to an injunction against the city forbidding it to construct, maintain or operate a system of water works of its own in competition with the water company, or for the purpose of supplying the city with water for fire protection and municipal use; and the injunction heretofore granted, temporarily restraining the city from issuing bonds for this purpose should be made perpetual. It would seem that the complainant is further entitled to a mandatory injunction against both the city and the water company, requiring them and each of them to specifically perform the contract as essential to the protection of the security for the bonds. In Union Pacific R. Co. *v.* Chicago R. I. & P. R. Co., 163 U. S. 564, 41 L. Ed. 265, the Supreme Court decreed specific performance of a
146 continuing agreement for trackage rights as between railway companies, basing its opinion on this point on the former case of Joy *v.* St. Louis, 138 U. S. 1, 34 L. Ed. 843.

The court also cites, upon this point, Franklin Telegraph Company *v.* Harrison, 145 U. S. 459, 36 L. Ed. 776; Prospect Park &

C. I. R. Co. *v.* Coney Island & B. R. Co., 144 N. Y. 152, 26 L. R. A. 610, and Denver & R. G. R. Co. *v.* Alling, 99 U. S. 463.

In the Union Pacific case the court said:

"But it is objected that equity will not decree specific performance of a contract requiring continuous acts involving skill, judgment and technical knowledge, nor enforce agreements to arbitrate, and that this case occupies that attitude. We do not think so. The decree is complete in itself, is self-operating and self-executing, and the provision for referees in certain contingencies is a mere matter of detail and not of the essence of the contract.

"It must not be forgotten that in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them. As has been well said, equity has contrived its remedies 'so that they shall correspond both to the primary right of the injured party, and to the wrong by which that right has been violated;' and 'has always preserved the elements of flexibility and expansiveness, so that new ones may be invented, or old ones modified, in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition in which new primary rights and duties are constantly arising and new kinds of wrongs are constantly committed.' Pom. Eq. Jur. sec. 111."

The cause of action arising upon a failure to pay water rentals due under a contract after the service has been performed by the water company, is a legal cause of action, and the legal remedy is ordinarily adequate. Raton Water Works Co. *v.* Raton, 174 U. S. 360, 43 L. Ed. 1005.

147 In the case under consideration, however, a court of equity has taken jurisdiction of the whole controversy at the suit of the trustee, who has an equitable right to enforce the contract for the benefit of the security of the bonds. If I am correct in my findings of fact and conclusions of law as contained in this report, it follows that the complainant is entitled to full and complete relief during the entire life of the contract. A breach of this contract on the part of either the water company or the city would materially affect the security. Should the city refuse to pay future water rentals after they had accrued, the remedy of the trustee would be either in an action at law in the State court, inasmuch as the annual rental does not exceed the sum or value of $2,000, or by supplemental and ancillary bill in this cause and in this court. This court having assumed jurisdiction of the entire controversy will not remit the complainant for further relief to the courts of another sovereignty. The remedy, by supplemental bill in this court, would be allowed only in the exercise of the equitable jurisdiction of the court. The complainant would thus appear to be without a plain, complete and adequate remedy at law for future breaches of the contract as against the city. Should the water company fail or refuse to comply with its obligations under the contract, the complainant would have an action for damages for such breach; but it ap-

pears that the water company owns no property other than that covered by the mortgage to the trustee; so that a suit for damages against it would not measure up to the standard of an adequate legal remedy.

Hence, I conclude that the complainant is entitled to a decree as against both the city and the water company, requiring them and each of them to specifically perform the contract between them.

148 *General Conclusions.*

Upon the whole case I find and conclude as follows:

1. That the objection to the jurisdiction is not well founded, inasmuch as the jurisdiction rests upon the Federal question presented without regard to the citizenship of the parties.

2. That the doctrine of *res judicata* is not applicable to the complainant in this case, for the reason that the complainant was not a party or privy to the State court suit.

3. That this court is under no obligation to follow the decisions of the highest court of the State, rendered after the contract in question had been entered into and the rights of the complainant and those it represents had been acquired thereunder; that the decisions of the State courts prior to the execution of the contract were not so long and so firmly established as to constitute a rule of property; and that this court will decide independently whether there is a contract and whether its obligation has been impaired.

4. That the contract between the city and the water company did not create a debt within the meaning of the constitution and the laws of the State of Georgia; but that such contract is valid and enforceable.

5. That the exclusive franchise granted by the city to the water company to use the streets and maintain its system of water works cannot be revoked by the city in its own interest, nor can its value be impaired by competition on the part of the city itself within the term of twenty years, during which the city obligated itself to take and pay for the water for fire protection.

6. That the city cannot, under the facts of this case, forfeit
149 the rights and franchises of the water company for inefficient service or for a failure to supply water of a higher quality of purity; nor can it plead such facts in bar of the equitable relief sought.

7. That the agreement to accept water for municipal use in commutation of city taxes is inoperative and void under the constitution and laws of the State of Georgia.

8. That the complainant is not entitled to set up and enforce in this suit any rights, legal or equitable, that the American Pipe Company may have acquired by reason of furnishing the water company with funds to pay maturing interest coupons on its bonds.

In view of the foregoing facts and conclusions, I recommend that a decree be entered according the following relief:

1. That the contract entered into between the city and the water company, which contract constitutes the subject of this suit, be declared to be valid, binding and enforceable.

2. That an injunction be granted the complainant, prohibiting the city from negotiating, selling or disposing of the bonds authorized to be used in construction of a water system by the city, and from constructing, maintaining or operating any system of water works in the city of Dawson for the purpose of supplying either the city or its inhabitants with water for fire protection or domestic use.

3. That the city be enjoined from revoking or attempting to revoke the rights and franchises granted to the water company under the contract during the term of twenty years, within which it contracted to take and pay for water from the water company.

4. That the city shall pay to the complainant the sum of the water rentals due and unpaid from January 1, 1893, with in-
150 terest on each installment thereof, as the same matured, at the legal rate of seven per cent. per annum after maturity.

5. That an accounting be had between the parties to this suit, in order that it may be ascertained what, if anything, is due by the city for water furnished by the water company under the agreement made in commutation of city taxes, and that the value of water so supplied should be allowed as a credit against the demand of the city for the amount due by the water company as ad valorem taxes on its property; and that until such an accounting be had and the city shall pay over the amount found to be due and unpaid by it on account of water rentals, the temporary injunction heretofore granted against the city from proceeding with the collection of the tax execution issued by it be continued in force, and that the city be further enjoined from issuing or seeking to collect any execution for ad valorem taxes against the property of the water company until such accounting and settlement.

6. That the city and the water company, and each of them, be required to specifically perform the contract forming the subject of this suit, and to severally comply with their respective obligations arising and to arise thereunder, and to this end that a mandatory injunction be issued.

Respectfully submitted,

W. A. WIMBISH,
Master in Chancery.

March 30, 1903.

151

Memoranda.

1. After the evidence had been closed, the defendant presented an application for leave to introduce further testimony for the purpose of showing that on April 26, 1902, the frames of several birds had been discovered in the reservoir of the water company, as the result of which the water had become contaminated.

This application was accompanied by affidavits tending to support the fact. The complainants submitted a response, and filed counter affidavits.

By agreement of counsel, the affidavits were received as evidence, and have been duly considered by the master in arriving at his findings of fact in this case.

2. Full draft of the foregoing report was served on counsel for each of the parties on March 30, 1903. On April 17, 1903, the suggestions of amendment and change were heard at the master's office in the city of Atlanta. The complainant offered no exceptions or suggestions of change and amendment. Numerous suggestions of change and amendment were submitted by counsel for the defendant, City of Dawson, and were argued. These suggestions, together with the rulings of the master thereon, have been identified and are filed herewith as a part of the record.

3. On April 13, 1903, counsel for the City of Dawson presented an application for leave to open the case for the purpose of adducing oral testimony relating to pressure and service furnished by
152 the water company at a fire which occurred on the 6th day of April, 1903, in the city of Dawson, resulting in the destruction of two residences. This application was supported by a number of affidavits. The complainant filed its response to this application, and also submitted affidavits.

The application came on to be heard on April 17, 1903, and was argued by counsel. After full consideration, the master denied the application. This application and response, together with affidavits, have been identified and filed as part of the record in the case.

Inasmuch as the master is of the opinion that the application should not be granted, he has not considered the facts alleged, or the affidavits submitted, and makes no finding thereon.

4. The master files with this report the record in the cause, as presented to him, which record is specified as follows:

(1.) The pleadings in the case, consisting of the original and amended bill, demurrer and answers of the defendants, and replication of complainant, together with the orders entered in the cause.

(2.) Two bound volumes, consisting of 692 type written pages and containing a report of the evidence and proceedings in the cause before the master, together with a certified copy of the code of the city of Dawson.

(3.) The briefs of counsel.

(4.) The application of defendant, City of Dawson, filed May 29, 1902, to reopen the case for reception of evidence, together with the response of complainant and the affidavits filed in behalf of the respective parties.

(5.) The application of defendant, City of Dawson, to reopen the case for the reception of evidence, which application was filed
153 on April 13, 1903, together with the response of complainant, the affidavits filed in behalf of the respective parties, and the rulings of the master on the application.

(6.) The suggestions of change and amendment filed by the defendant, City of Dawson, on April 17, 1903, to the draft of the master's report, together with the rulings of the master thereon.

All of the foregoing (except pleadings, orders of court and briefs of counsel), have been identified by the initial signature of the master, and constitute the record in the cause before the master.

April 22, 1903.

Respectfully submitted, W. A. WIMBISH,
Master in Chancery.

Filing: Filed in clerk's office 27 April, 1903.

O. C. FULLER, *Clerk*,
By N. A. BROWN, *Deputy*.

154 *Suggestions of Change and Amendment to Report of Master.*

In the Fifth Circuit Court of the United States for the Northern District of Georgia, Western Division.

COLUMBIA AVE., &C., TRUST COMPANY
vs.
CITY OF DAWSON ET AL. } In Equity.

And now comes the City of Dawson by its counsel, Guerry & Hall, M. C. Edwards city attorney, and J. A. Laing, and in response to the notice of the Honorable W. A. Wimbish, master in chancery, makes and presents the following suggestions of change and amendment to the draft of his report in the above stated cause.

I. The city calls the attention of the master to the fact that in preparing his said draft of his report he has altogether omitted a ruling made by him whereby he rejected certain testimony offered by the city.

The city now requests the master to change and amend his report so as to present said ruling and the proposed evidence as rejected, and in order to aid the master in doing so, and in order to show the ruling of the master and the proposed evidence that was rejected, the city shows as taken from the report made and filed in the cause by the reporter that during the examination of witnesses before the master at Dawson, (see reporter's report, p. 356), when A. J. BALDWIN, witness for the city was being examined, and Mr. Guerry was questioning him as to the Rauch residences, the following transpired:

155 By Mr. GUERRY:

Q. State what you saw with reference to that.

Here the question was terminated by an objection, and Mr. Guerry said to the master, "We propose to show that they undertook to wet

that building so as to prevent it from catching fire, and that the roof was about twenty feet high, and that the stream did not have force enough to go on to the building so as to wet it. We would ask your honor to rule on that."

The master thereupon responded: "Mr. Guerry, any of these fires that you have reason to believe that you can show the conditions were such as are required in the test, of course the testimony would be admissible, but I have ruled several times that testimony will not be admitted unless you can bring it within the conditions already stated."

Mr. Guerry responded: "Understand I am doing this for the purpose of getting the full benefit of the exceptions. Not contesting your honor's ruling, I want to get the full benefit of it. I don't want it to appear in the record that I had one or two little instances of this sort."

The MASTER: You can save time by stating what you expect to prove and let it go in the record."

Mr. GUERRY: "Very well, sir. I expect to prove certain things by certain witnesses."

The MASTER: "Very well, I will take a few minutes recess in order that you may state to the stenographer what you expect to prove; and I will have it read to me and then make a ruling."

At the termination of the recess Mr. Guerry said: "With the permission of the court we propose to prove by this witness, (A. J. Baldwin), and certain other witnesses, the following, and we now make these propositions at the suggestion of the court and in
156 order to save time, so that the court can rule upon them altogether.

We desire not to propose all of our proof, but enough of the same to indicate its character and its extent, on the question involved in the proposed proof.

By A. J. BALDWIN, the witness now on the stand, the following:

"That at the fires that destroyed the residences of F. L. Parks, one in the year 1898 and one in the year 1899, the hose was attached to the plugs of the Dawson Waterworks Company, not over 400 feet away, on one of the principal streets of the city; and the force from the same was not sufficient to do anything towards extinguishing the said fires; and the building in each instance was burned down; that the force of pressure from said hydrants was so weak that those trying to throw the water on the fire could not get near enough to throw the streams on the fires, although they did stand within 40 or 50 feet of the building.

That witness witnessed the fire that destroyed the Dawson oil mill, in Dawson, on the 4th of January, 1899. The mill was in full operation and supplied with 200 feet of standard hose, same kind and size of nozzle as the city's hose. This hose was immediately attached to the Dawson Waterworks Company's hydrant, 15 feet from the corner of said mill by the hands and turned on said fire. The

pressure of said water was so weak it was entirely insufficient to prevent the burning of said building although attached and put to work very promptly; and in consequence of said weak pressure thus used, those using the hose were unable to stay near enough to the fire to throw water on it. That the pressure at the time was not sufficient to throw the water over 30 feet high with a one inch nozzle attached to the hose. The mill was on one of the principal
157 streets of the city and one of the lowest points, being ten feet lower than the base of the standpipe of the waterworks company.

Witness saw the fire which destroyed the Farnum house, April 1898, being near his place of business. Fire caught in kitchen, low one story building, not more than fifteen or twenty feet high; and the stream of water from the waterworks did not and could not reach more than 25 feet high on that occasion. Don't know whether the nozzle was ¾ or one inch; but it was one or the other. On this occasion witness was hit by the stream of water with its full pressure in the face while standing within eight feet of the nozzle and suffered no inconvenience from it, except slight strangulation. At the time this happened the nozzle was not more than about 50 feet from the plug. Witness cannot state the length of the hose. Witness could not state positively what the length of the hose was. It was probably 150 feet. Eight buildings were destroyed on this occasion; and the fire was never checked until the people were able to get the steam fire engine belonging to said city at work, when the flames were subdued by said engine. That from his own experience with fires, he knows that — a pressure equal to that agreed to be furnished by the Dawson Waterworks Company, viz: 50 feet vertically in still air, this fire could have been extinguished with the apparatus then in hand and with the hose being used, with slight damage to the hotel and kitchen. Witness was at the fire that destroyed the J. R. Smith residence, May 1st, 1899. The plug to which the hose was attached at said fire was about 400 feet from said residence; and the pressure was not sufficient to throw the stream over a chimney 26 feet and 4 inches high. Witness measured the chimney and saw the failure.

158 Respondents proposed to prove the following by J. S. Lowrey:

That after the hose was attached to the hydrants of the waterworks company on one of the principal streets of the city, when an effort was made to extinguish the Farnum house fire, the water could be thrown barely to the top of the kitchen, one-story part of the building, not over 22 or 23 feet high.

Respondents proposed to prove by F. M. Jennings, the following:

As to the dry kiln fire in 1896, that the stream was never over 25 feet high; and that at the Grier residence, consumed in 1898, the pressure was not sufficient to throw the water on a servant's house in the yard, not more than 20 or 25 feet high; and that he saw a man carry the nozzle nearly to the top of said house and pour the

water from it. It would not have thrown a stream. Also the Parks fire in 1899, the pressure was not sufficient to throw a stream to the top of the house, it not being more than 30 feet high. And also substantially the same as to the oil mill fire.

Respondents proposed to prove by A. M. Raines, the following:

That at the oil mill fire the pressure was so weak that in order for witness to throw the *fire* on the end of the stable, which was adjoining said property, and it was not more than fifteen feet high, witness was compelled to put the end of his thumb over the nozzle so as to make it squirt a small stream on said stable and keep it from catching fire from the heat of the other fires. That said property was on one of the principal streets of the city. Witness was at the Parks fire and in order to prevent the building on the opposite side of the street from catching fire, it was necessary to go on
159 top of the veranda so as to be able to throw the water from the hose on the roof of said building, which was a one-story building not more than twenty feet high.

Respondents proposed to prove by E. L. Rainey, the following:

That the stream at the Grier fire in 1898 could not be thrown to the top of a one story frame house not more than 20 feet high. That at the Parks fire the stream could not be thrown more than 15 feet high; and that it was necessary to get the water on top of the house, 24 feet high, to carry the nozzle to the place where needed and let the water pour out.

Respondents proposed to prove by A. J. Carver, the following:

That when the Farnum house burned in 1898, he noticed that the pressure from the hydrants of the waterworks company was very poor and inadequate at first but that the pressure was much better. The cause of this improvement witness is not able to state as the city's fire engine was soon put in operation and water was pumped from the cisterns of the city as well as from the hydrants.

Respondents proposed to prove by Charles Deubler, the following:

As to the Baldwin & Company and Geise dry-kiln fire in 1896, that the pressure was wholly insufficient to throw a stream more than 25 feet high. That at the Variety Works fire the pressure was lacking and the fire engine had to be called into requisition to accomplish anything.

Respondents proposed to prove by J. R. Mercer, the following:

That at the Parks fire in 1899, the pressure from the hydrants was so inadequate, the holder of the nozzle had to get on top of an adjacent building in order to get water there; and that the water could not be thrown more than 30 feet high.

160 Respondents proposed to prove by W. F. Locke, the following:

That at the Witchard fire in June, 1897, the waterworks company's hydrants were insufficient to throw the water 20 feet away from the nozzle.

Respondents proposed to prove the following by F. E. Clark:

That he attended the fire which burned the residence of Robert

Smith in Dawson in 1899; and that the pressure was not sufficient to throw a stream over a chimney about 25 feet high at said fire.

Respondents proposed to prove the following by T. L. Guerry: That he was at the Bob Smith fire in May, 1899. That there were about 200 feet of hose attached to the hydrant; and there was not enough pressure to get the water on top of a chimney 25 feet high.

Respondents proposed to prove by C. V. Evarts, the following: That he attended the fire which burned the residence of Mr. Hamilton, September 20, 1898, in Dawson. That 400 feet of hose were used. Fire was within 400 feet of the pumping station of the Dawson Waterworks Company, said county (Terrell), the hose being attached to a plug of said company; and the water could not be gotten from the nozzle to the top of the veranda 12 feet high.

Respondents proposed to prove by W. E. Riordan, the following: That he was present at the lumber kiln fire in Dawson in 1896; and that the pressure of the water from the hydrants of the waterworks company, was not sufficient during his observation, to throw the water ten feet from the nozzle.

161 The MASTER: The question now under consideration is not the effect of this evidence, but its relevancy to the extent of making it admissible. Should the master err in excluding testimony, the result would be to put the parties to additional expense, cost and delay; and for that reason I am liberal in my views, that is, I try to be, as to the admissibility of testimony. Nevertheless, if I am clear that testimony is not relevant, and should not be admitted, I feel I should not admit it.

Now the contract in this case provides for the construction of a system according to specifications given, and that there should be erected a reservoir of a certain capacity; and of such a height as to afford a pressure under the circumstances stated in the ordinance. As to the system, it is provided that the system shall be thorough and complete; and that a supply of water for the purposes stated shall be maintained. I think that imposes on the waterworks company the duty of maintaining an efficient system and of keeping a sufficient supply of water on hand.

Now any evidence showing that this reservoir was not of the required height, would be entirely admissible. Any evidence showing that under the test provided in this contract, or under conditions substantially the same, showing that the contract was not complied with, I think would be admissible. I shall permit you to prove that the tank leaked. You may introduce evidence to show, if you choose and can, that the tank was not kept filled with water. You may also introduce evidence to show, if you can, under these conditions, or conditions substantially like these, that the pressure was not sufficient to raise the water 50 feet vertically, in still air. I shall permit you to show that there was a total failure of pressure for a greater or less length of time; and if the failure is total, then there is

162 no pressure.

I hardly think we can go into the realm of speculation as to

what the pressure would be under conditions which vary substantially and materially from those laid down in the ordinance. In other words: whether the water pressure was weak and continued so for a short length of time under conditions that surrounded the lumber kiln fire. I hardly see how that illustrates the issue at all. I will permit you to introduce evidence to show that the company has not in any respect maintained its system as it should have done. As I have admitted evidence to show that there was a new tank made, I will admit evidence showing that the tank leaked. You may show that the pipes throughout the city were not properly maintained or flushed; and that the source of supply has been allowed to be contaminated; and that the service was improper. I will permit all that; but I don't think I should permit evidence as to what occurred at particular fires under conditions totally dissimilar from those stated in the contract.

Mr. GUERRY: Your honor's ruling, as I understand it, I would like to show in the record, as invoked upon the offer to prove certain facts, which I have stated, by those particular witnesses, your honor rules I cannot prove.

The MASTER: You stated what you expect to prove?

Mr. GUERRY: By way of illustration.

The MASTER: In conformity with my general ruling, I will exclude the evidence offered, unless it is proposed to show in connection therewith that there was a total failure of pressure, or that the surrounding circumstances were substantially the same as those laid down in the contract for a test, if you can come up to those conditions you may proceed."

163 The city wishes to contend and does contend that the rejection of this proposed evidence was material error on a vital question in the case, namely: Whether the system of waterworks as constructed and operated came up to the requirements of the contract as to pressure, and that the report of the master to the effect that the waterworks company had complied with its contract in this particular was itself erroneous on account of the rejection of said testimony, the same being relevant and otherwise competent; and the city further wishes to insist upon a reopening of the case for the purpose of hearing and reporting the testimony as offered together with such other testimony of the same character as said witness could give upon re-examination.

II. The city submits that the master omits a very material fact proved by the testimony of one of the witnesses for the complainant, namely: F. A. RUGGLES, (see Rec. p. 79), as follows:

That he (witness) removed the timbers of the old tank when it was torn down in order to construct the new one; that there was at that time in the bottom of said old tank four inches (in depth) of foul and muddy sediment.

The city submits that in as much as a witness introduced by the complainant testified to this fact, and his testimony was undisputed, it thus became an established fact in the case, and one of vital im-

portance as showing one of the causes for the contamination of the water supply, and as a fact disproving the contention of the complainant that the waterworks company had, up to the time of the construction of the new tank, carried out its contract in supplying the right kind of water for the citizens of Dawson. The
164 city suggests that the master report this evidence and a finding of the fact which it establishes.

III. The city submits that Mr. JAMES H. DAWES, superintendent of the waterworks company, and a witness for the complainant, testified as follows: (See p. 115):

"The Dawson Water Works Company had charge of the original litigation and all these demands against the City of Dawson for water rentals up to the decision of the supreme court of Georgia already referred to."

The city submits that as this testimony was from a witness of the complainant, and was undisputed, the fact was established, and being a material one should be reported to the court, and the city now requests the master to make such finding in his report.

IV. The city submits that J. A. HORSLEY superintendent for waterworks company, and witness for complainant testified as follows, (p. 130):

"My recollection is during the summer of 1900, and may be 1899 and 1900, during the very dry season the pressure went down three or four different times; it was run down so low there was no pressure. Several times early in the morning it would not run out of the hydrant. It was this way I suppose two or three times."

The city submits that this evidence being from the complainant's witness, and not being contradicted, the facts testified to became established; that they are material on the question as to whether the waterworks company complied with its contract by keeping up its pressure, and ought to be reported in a finding of such fact by the master: The city now requests that the master make such finding in his report.

165 V. The city submits that the same witness testified, (p. 135) as follows:

"Occasionally they (the people) would tell me in effect that the water was muddy and unfit for use and smelled badly, and the pressure was insufficient, for instance on these water ends, and asked me to flush that main so the water would clear up, and I would do it. They said it was muddy. Once or twice they would tell me about its being muddy—several times about its being muddy, and once or twice about its being somewhat smelling bad. During that time I remember complaints made several times about the pressure. My recollection about the first complaint was made during the Whitchard and Green fire in 1897. I have seen buzzards up there (on the tank) in the day."

The city submits that these facts above testified to by witnesses for the complainant, and not being disputed, were established that they are material and ought to be reported.

VI. The city most respectfully submits that the two principal issues of fact in the case and which are determinable from the oral testimony adduced, are as follows:

1. Whether the waterworks company had performed its contract as to pressure, both in the proper construction of its system, and in its service, and the master erred as a matter of fact in not finding from the evidence that the Co. had not performed this part of its contract.

2. Whether it had performed its contract in the kind of water supplied, and the master errs in not finding in fact that the Co. had not performed this part of its contract.

The city most respectfully submits and suggests that on these questions the substance of the oral testimony on each side
166 should be reported, and as a basis for the finding of the master upon each issue.

The city submits that this is especially true as *to* the report of the evidence by the stenographer contains questions and answers (not being in narrative form), and has a large amount of matter that is entirely immaterial.

VII. The city respectfully submits that the master during the progress of the investigation, made a number of rulings in which he allowed and disallowed questions and answers of witnesses upon objection being made, and in some instances allowed such questions and answers tentatively. These rulings, the city respectfully submits, ought to be reported in the master's report, as otherwise neither the complainant nor the city, is in a position to except to them or any of them.

VIII. The city respectfully submits that the master should have found in his report that the waterworks company had not performed its contract as to pressure, that its service had not been adequate or reliable; such facts being established by the testimony of the witnesses in the case.

In support of this suggestion or exception, the city now refers to the parts of the testimony relied on as follows:

Witness W. R. Baldwin, pages stenographer's report 337–8–9.

Witness A. J. Baldwin, pages 350–1–2–5 (where he testifies as to test made by Mr. Horsley, superintendent) 354.

J. G. Dean, pages 392–3–4.

W. B. Cheatham, pages 415–16–17–18–19 (that about test made by Horsley) 420.

R. L. Melton, page 437.

167 John Seay, pages 444–5 (about the McClellan fire June '98, when he states not more than 100 feet of hose was used) 446–7–8–9.

F. M. McNulty, pages 459 (about the McClellan fire, the nozzle, the length of the hose and the turning on of the water) 460–1–2 (about the test).

C. Deubler, pages 502–3–4–5 (McClellan fire) 506–7–8–9–10–11.

J. P. Allen, pages 533–4–5–6–7–8.

IX. The city respectfully submits that the master in his report should find that the water furnished by the company was not of the kind required under its contract, but was muddy, filthy, offensive to smell, and unsanitary; that it was unfit for drinking, cooking, washing or bathing purposes, at many times and during considerable periods, from the 1st of January, 1895, and up to the time of the examination of witnesses in March, 1902. And in support of this suggestion the city now refers to portions of the testimony of witnesses as follows:

J. G. Dean, pages 390–1–2.
A. J. Carver, pages 403–4–5–6.
R. L. Melton, pages 436–7.
John Seay, pages 456 (about the dead horse in the water supply) 457.
J. W. F. Lowrey, pages 464–5–6–7–8 (about the character of the water, location, drainage, etc.).
R. F. Simmons, pages 478–479–480.
A. M. Raines, pages 483–4–5–6–7 (as to character of water, location, drainage, city limits).
R. J. Sewn, pages 487–8–9.
A. J. Baldwin, pages 493–4.
168 W. F. Locke, pages 496–7–8.
Walter Christy, pages 499, 500–1–2.
C. Deubler, page 550.
L. C. Goneke, pages 530–1–2.
J. P. Allen, pages 533–4–5–6–7–8–9, 540–1–2–3–4.
J. S. Lowrey, pages 545–6.
A. R. Lamar, pages 547–8–9.

The city also refers to the affidavit of George Calloway, filed as a part of the evidence of the case, with permission of the master on the 29 day of May, 1902, and one 3d day of June, 1902 same witness, proving the discovery in the water tower of the waterworks company, of three dead and decaying buzzards.

As to the findings of fact contained in the draft of the master's report as served, the city by way of suggestion of change and amendment, submits the following:

I. The master errs in his second finding of fact as follows: That the waterworks company was granted an exclusive franchise for the period of ninety-nine years, and for period of 20 years, period of contract, such a grant being impossible under the law.

Also in failing to find what kind of water was required to be furnished under the contract between the city and the waterworks company.

1½. The master errs in his third finding of fact that the city had express notice that the bonds were to be issued and sold for the purpose of procuring the money with which to construct the waterworks plant, and that the city acquiesced in this arrangement.

169 II. The master errs in his fourth finding of fact in failing to find as shown by the undisputed evidence, that after the

acceptance of the sources of water supply in 1891, the same were not protected in any way or to any extent by the waterworks company from contamination, and that in consequence the water supply and that actually supplied, was much of the time so muddy and otherwise filthy and so offensive to the smell, as to be unfit to drink, or to use in cooking, or for washing clothes, or for bathing purposes; and that such was the case through the years 1895, '96, '97, '98, 1899, 1900, 1901, and up to the time when the testimony was taken in the case, and after that especially on the 22 day of May, 1902, when the city showed by affidavits that the standpipe of the company being left open and exposed, three dead and decaying buzzards were found in said standpipe, and in the water from which only the citizens were supplied by said company, the master hearing evidence as to this latter fact by affidavits of the witnesses, upon consent of counsel on both sides.

Also in failing to find in said finding, the specific causes of such contamination, viz: vegetable matter, offal in and around butcher pen left to be eaten by hogs and buzzards or to decay, lots and stables in which animals were kept, and surface closets for six residences of people, all proved and admitted to be within the area of drainage into said water supply, and known so to be by the waterworks company.

Also in not finding that the portion of said area containing said butcher pen, and offal, and said lots and stables for animals, and surface closets, was without the corporate limits of said city.

Also in not finding as a specific cause of the contamination of said water at one time, viz: that on the — day of —— 1897-8 or 9, a dead, decaying, and far decayed horse, was found
170 lying in said water supply, who had evidently then and there lain for days, about fifty feet above the inlet pipe of said waterworks company; said fact being proved by witness John Seay for the city, and by James A. Horsley, superintendent, and witness in the case for the waterworks company, and being undisputed. See page- of stenographer's report 456 and 569.

The city avers that all of the facts above stated were proved, and are vital to one of its defenses, viz: the failure of the waterworks company to perform its contract as to the kind of water to be supplied.

III. The master errs in his fifth finding of fact, in finding that the system was tested by the city.

Also in finding that the waterworks for several years, operated to the mutual satisfaction of the parties.

Also in failing to state in finding, the number of years the waterworks company had been so operated.

Also in finding that the city had not made complaint as to the quality of said water, when it was shown by the evidence in the case, that the city had filed a plea to such effect in May, 1896, in a suit brought by said waterworks company against the city for the rental of 1895.

Also in not finding that the city proved as well as claimed, that

notwithstanding that its officials may have participated in the use of the water, their action was that of any citizen in an emergency, and was not authorized by the city in its corporate capacity.

Also in finding that the city maintained a fire organization during the year following 1894, as it did in preceding years.

Also in finding that no other means for fire protection was
171 afforded by the city; also in finding that the city did not forbid the use of the water by its fire department.

Also in not finding that the city immediately upon the renunciation of said contract, had notified Horsley, the superintendent of the company as proved by the mayor, W. B. Cheatham, and by Horsley himself as a witness in the case, that the contract for water was at an end, and that the city would be no longer responsible.

Also in not finding that on every occasion when the water was used or sought to be used during the years 1895, '96, '97, '98, '99, and up to the time of the building of the new standpipe, the pressure was so inadequate and the supply of water so insufficient, that the said water was always unsuccessfully used, and the buildings on fire practically consumed for want of such pressure and said supply.

Also in finding that the city after the repudiation of said contract had continued to enjoy the fire protection afforded by the waterworks company and to use the water for that purpose in every instance in the same manner and to the same extent, that it did prior to such repudiation.

IV. The master errs in his eighth finding of fact as follows: In partially reporting the facts with reference to the source of water supply, and in finding that the condition of the water shed is substantially the same as it was at the time of the selection thereof and as it has been since, because the evidence showed that the scaffold or butcher pen, and the slaughter of cattle there at, was begun after the selection of said source of supply, and in not fully describing the said area of drainage, and in not finding the causes of contamination shown by the evidence and not disputed, as set forth
172 by the city in its second exception above; and in not finding as a matter of fact, that said causes of contamination were without the limits and jurisdiction of the municipality; and that the waterworks company had failed after full notice of these causes of contamination, to protect the said water supply therefrom; and in not also finding that because of such contamination, and under the undisputed evidence of many witnesses in the case, the said water of said company furnished to the citizens of Dawson was so muddy and filthy and offensive to the smell, as to be unfit to drink or use in cooking or in washing clothes, or bathing.

Refers especially to the following testimony: John Seay p. 456; J. W. F. Lowrey p. 464, '5, '6, '7, and '8; A. M. Rains p. 483, '4, '5, '6, and '7; and affidavits of George Calloway as to decaying of buzzards found in tank.

V. The master errs in his ninth finding of fact as follows: In not

reporting the number of occasions on which the reservoir was found to be empty; also in finding with reference to the occasion of 1897 when the pressure was fully tested by said Horsley, superintendent, that said test was from a point on what is known as an end-pipe, and that the water failed to reach a height of fifty feet vertically, without more, when the proof clearly showed as a fact that said test was made in still air, through 100 feet of new and good hose, with a one-inch nozzle, thoroughly and fully, and that the pressure was insufficient to throw said water vertically more than thirty feet at best.

The master also errs in said finding in finding that excepting on rare occasions, the reservoir was kept supplied with water sufficient to produce the required pressure, the undisputed evidence being to the contrary.

173 The master also errs in finding and stressing the alleged fact that no complaint concerning the character of the service or the amount of the pressure, was made to the waterworks company until after the institution of the present suit, without reporting in the same connection that the claim of the company as supported by the evidence, was to the effect that after the city had renounced said contract, it was not its right or duty to make any complaint.

VI. The master errs in his tenth finding of fact, in finding and stressing the alleged fact that the city did not base its repudiation of the contract upon inadequacy of supply, inefficiency of service, or quality of water furnished by the company, the defense of the city being as the pleadings show, predicated upon inadequacy, and insufficiency of service, and quality of water since that time, the city having paid the waterworks company in full for the years prior to, and for the year during which, said renunciation was made.

VII. The master errs in his fourteenth finding of fact in finding simply that subsequent to the decision of the supreme court, in The City *versus* The Water Works Company, the latter had assigned to the complainant exclusive right to demand, collect and receive, the water rentals to be paid by the city of Dawson as provided in the contract, without finding more and as follows: That prior to the date of said assignment, the waterworks company had alone demanded payment of water rentals, had alone received them when made, had alone instituted suit for unpaid rentals, and up to said date of assignment, had alone exercised control over the alleged right to collect such rentals from year to year.

174 VIII. The master errs in toto in his fifteenth finding of fact, because the same was entirely irrelevant.

IX. The master errs in his seventeenth finding of fact that the complainant was without notice of the litigation between the city and the waterworks company until after the decision of the supreme court March 18, 1899; it appearing from the record of the cause, that said suit was instituted in 1896 and went to the supreme court

twice, and was pending at the time the complainants filed their bill, and is still pending.

The city further suggests that the master state at appropriate place in his statement of defendant's answer that defendant denied specially instead of generally the material allegations of the bill except those admitted.

Also that he report that before repudiation of contract the waterworks were operated about two years and a half instead of three years and a half as stated by him.

Also in finding in fact for the complainant the right to recover the water rentals sued for and all other relief, when the evidence failed to show that the waterworks company had performed its contract as to pressure or kind of water or otherwise.

GUERRY & HALL,
J. A. LAING, AND
M. C. EDWARDS, *City Att'y,*
Att'ys for the City of Dawson.

175 *Action of Master on Proposed Change in his Report.*

The foregoing suggestions of change and amendment submitted by the defendant City of Dawson to the draft of the master's report served upon it, came on to be heard on April 17, 1903, at the office of the master in the city of Atlanta, and was argued by counsel.

After consideration thereof, the master rules as follows:

(1.) The recitals of fact in the first suggestion are true. The master deems it unnecessary to incorporate in his report his rulings made at the time relating to the reception or rejection of evidence. All such rulings appear in the report of the proceedings, and are filed as a part of the record before the master.

(2.) The 2nd, 3rd, 4th and 5th suggestions are disapproved and disallowed. All facts recited in these suggestions are merely evidential in their character, and were duly considered by the master in arriving at his findings of fact. In the opinion of the master, the report should not be burdened with a statement of the evidence, but should be confined to the finding of ultimate facts.

(3.) The 6th suggestion is disapproved and disallowed.

(4.) The 7th suggestion is disapproved, for the reason stated in the ruling upon the first suggestion; that is to say, all rulings of the master relating to the admission or rejection of evidence appear in the record, and may be assigned as error before the court.

(5.) The 8th and 9th suggestions are disallowed and disapproved.

176 (6.) The 10th suggestion presents an exception to the legal conclusions of the master that the water company was protected by its contract from revocation on the part of the city of its franchise to use the streets for the contractural period. This exception is overruled.

The suggestion that the master had failed to find the kind of water required to be furnished under the contract is disallowed, for the reason that in his first finding of fact the master has so found.

(7.) The 11th suggestion is disallowed, for the reason that the master has fully considered the evidence referred to and has, in his report, found partly in accordance with the suggestion.

(8.) The first assignment of the 12th suggestion is allowed to this extent, and with this exception: The system of waterworks erected by the water company was formally tested in the presence of the city officials, and the test was declared by the city to be satisfactory and in full compliance with the requirements of the contract. The actual test was made by officials and employees of the water company.

The second and third assignments in this suggestion are allowed to this extent: The waterworks system was for several years; that is to say, from August 18, 1891, to January 1, 1895, operated to the mutual satisfaction of the parties.

The fourth assignment in this suggestion is disallowed with this exception: The City of Dawson filed a plea to the suit of the waterworks company against it in May 1896 in the superior court of Terrell county, Georgia, in which plea it set up the impure quality of the water and the lack of efficient service. No evidence
177 appears to have been taken under this plea, nor does the same appear to have been urged.

All other assignments contained in this suggestion are severally disallowed and disapproved.

(9.) The remaining suggestions are hereby severally disapproved and disallowed, excepting the suggestions that in the statement of the case the master stated that in its answer the defendant denied generally the material allegations of the bill. This is modified so the statement will read that the defendant, by its answer, denied generally and specially the material allegations of the bill.

W. A. WIMBISH,
Master in Chancery.

Filing: Filed in clerk's office 27 Ap'l, 1903.

O. C. FULLER, *Clerk*,
By N. A. BROWN, *Deputy.*

178 *Exceptions before the Court.*

In the Fifth Circuit Court of the United States for the Northern District of Georgia, Western Division.

COLUMBIA AVE., &C., TRUST COMPANY *vs.* THE CITY OF DAWSON ET AL. } In Equity. No. 44. Bill, Answer, and Master's Report. Filed April 27, 1903.

And now comes The City of Dawson, the defendant, by its counsel Guerry and Hall, J. A. Laing, and M. C. Edwards, city attorney, and files within one month from the filing of the master's report in the above cause, the following exceptions of law and fact thereto:

Exceptions of Law.

I. The city submits that as certified by the master it offered certain oral evidence (as appears from the report of the evidence made by the reporter, pages 356 *et seq.*) during the examination of the witnesses in the cause before the master and which the master then and there rejected, and which evidence so offered and the rulings thereon as now certified by the master, were and are as follows:

179 BY MR. GUERRY:

Q. State what you saw with reference to that.

Here the question was terminated by an objection, and Mr. Guerry said to the master, "We propose to show that they undertook to wet that building so as to prevent it from catching fire, and that the roof was about twenty feet high, and that the stream did not have force enough to go on to the building so as to wet it. We would ask your honor to rule on that."

The master thereupon responded: "Mr. Guerry, any of these fires that you have reason to believe that you can show the conditions were such as are required in the test, of course the testimony would be admissible, but I have ruled several times that testimony will not be admitted unless you can bring it within the conditions already stated."

Mr. Guerry responded: "Understand I am doing this for the purpose of getting the full benefit of the exceptions. Not contesting your honor's ruling, I want to get the full benefit of it. I don't want it to appear in the record that I had one or two little instances of this sort."

The MASTER: You can save time by stating what you expect to prove and let it go in the record."

Mr. GUERRY: "Very well, sir. I expect to prove certain things by certain witnesses."

The MASTER: "Very well, I will take a few minutes' recess in order that you may state to the stenographer what you expect to prove; and I will have it read to me and then make a ruling."

At the termination of the recess Mr. Guerry said: "With the permission of the court we propose to prove by this witness, (A. J. Baldwin), and certain other witnesses, the following, and we now make these propositions at the suggestion of the court and in
180 order to save time, so that the court can rule upon them altogether.

We desire not to propose all of our proof, but enough of the same to indicate its character and its extent, on the question involved in the proposed proof:

By A. J. Baldwin, the witness now on the stand, the following:

"That at the fires that destroyed the residences of F. L. Parks, one in the year 1898 and one in the year 1899, the hose was attached to the plugs of the Dawson Waterworks Company, not over 400 feet away, on one of the principal streets of the city; and the force from the same was not sufficient to do anything towards extinguishing the said fires; and the building in each instance was burned down; that the force of pressure from said hydrants was so weak that those trying to throw the water on the fire could not get near enough to throw the streams on the fires, although they did stand within 40 or 50 feet of the building.

That witness witnessed the fire that destroyed the Dawson oil mill, in Dawson, on the 4th of January, 1899. The mill was in full operation and supplied with 200 feet of standard hose, same kind and size of nozzle as the city's hose. This hose was immediately attached to the Dawson Waterworks Company's hydrant, 15 feet from the corner of said mill by the hands and turned on said fire. The pressure of said water was so weak it was entirely insufficient to prevent the burning of said building although attached and put to work very promptly; and in consequence of said weak pressure thus used, those using the hose were unable to stay near enough to the fire to throw water on it. That the pressure at the time was not sufficient to throw the water over 30 feet high with a one inch nozzle attached to the hose. The mill was on one of the prin-
181 cipal streets of the city and one of the lowest points, being ten feet lower than the base of the standpipe of the waterworks company.

Witness saw the fire which destroyed the Farnum house, April 1898, being near his place of business. Fire caught in kitchen, low one story building, not more than fifteen or twenty feet high; and the stream of water from the waterworks did not and could not reach more than 25 feet high on that occasion. Don't know whether the nozzle was ¾ or one inch; but it was one or the other. On this occasion witness was hit by the stream of water with its full pressure in the face while standing within eight feet of the nozzle and suffered no inconvenience from it, except slight strangulation. At the time this happened the nozzle was not more than about 50 feet from

the plug. Witness cannot state the length of the hose. Witness could not state positively what the length of the hose was. It was probably 150 feet. Eight buildings were destroyed on this occasion; and the fire was never checked until the people were able to get the steam fire engine belonging to said city at work, when the flames were subdued by said engine. That from his own experience with fires, he knows that a pressure equal to that agreed to be furnished by the Dawson Waterworks Company, viz: 50 feet vertically in still air, this fire could have been extinguished with the apparatus then in hand and with the hose being used, with slight damage to the hotel and kitchen. Witness was at the fire that destroyed the J. R. Smith residence, May 1st, 1899. The plug to which the hose was attached at said fire was about 400 feet from said residence; and the pressure was not sufficient to throw the stream over a chimney 26 feet 4 inches high. Witness measured the chimney and saw the failure.

182 Respondents proposed to prove the following by J. S. Lowrey:

That after the hose was attached to the hydrants of the waterworks company on one of the principal streets of the city, when an effort was made to extinguish the Farnum house fire, the water could be thrown barely to the top of the kitchen, one-story part of the building, not over 22 or 23 feet high.

Respondents proposed to prove by F. M. Jennings, the following:

As to the dry kiln fire in 1896, that the stream was never over 25 feet high; and that at the Grier residence, consumed in 1898, the pressure was not sufficient to throw the water on a servants' house in the yard, not more than 20 or 25 feet high; and that he saw a man carry the nozzle nearly to the top of said house and pour the water from it. It would not have thrown a stream. Also the Parks fire in 1899, the pressure was not sufficient to throw a stream to the top of the house, it not being more than 30 feet high. And also substantially the same as to the oil mill fire.

Respondents proposed to prove by A. M. Raines, the following:

That at the oil mill fire the pressure was so weak that in order for witness to throw the *fire* on the end of the stable, which was adjoining said property, and it was not more than fifteen feet high, witness was compelled to put the end of his thumb over the nozzle so as to make it squirt a small stream on said stable and keep it from catching fire from the heat of the other fires. That said property was on one of the principal streets of the city. Witness was at the Parks fire and in order to prevent the building on the opposite side of the street from catching fire, it was necessary to go on top of the

183 veranda so as to be able to throw the water from the hose on the roof of said building, which was a one story building not more than twenty feet high.

Respondents proposed to prove by E. L. Rainey, the following:

That the stream at the Grier fire in 1898 could not be thrown to the top of a one story frame house not more than 20 feet high.

That at the Parks fire the stream could not be thrown more than 15 feet high; and that it was necessary to get the water on top of the house, 24 feet high, to carry the nozzle to the place where needed and let the water pour out.

Respondents proposed to prove by A. J. Carver, *the following*:

That when the Farnum house burned in 1898, he noticed that the pressure from the hydrants of the waterworks company was very poor and inadequate at first but that the pressure was much better. The cause of this improvement witness is not able to state as the city's fire engine was soon put in operation and water was pumped from the cisterns of the city as well as from the hydrants.

Respondents proposed to prove by Charles Deubler, the following:

As to the Baldwin & Company and Geise dry-kiln fire in 1896, that the pressure was wholly insufficient to throw a stream more than 25 feet high. That at the Variety Works fire the pressure was lacking and the fire engine had to be called into requisition to accomplish anything.

Respondents proposed to prove by J. R. Mercer, the following:

That at the Parks fire in 1899, the pressure from the hydrants was so inadequate, the holder of the nozzle had to get on top of an adjacent building in order to get water there; and that the water could not be thrown more than 30 feet high.

184 Respondents proposed to prove by W. F. Locke, the following:

That at the Whitehard fire in June, 1897, the waterworks company's hydrants were insufficient to throw the water 20 feet away from the nozzle.

Respondents proposed to prove the following by F. E. Clark:

That he attended the fire which burned the residence of Robert Smith in Dawson in 1899; and that the pressure was not sufficient to throw a stream over a chimney about 25 feet high at said fire.

Respondents proposed to prove the following by T. L. Guerry:

That he was at the Bob Smith fire in May, 1899. That there were about 200 feet of hose attached to the hydrant; and there was not enough pressure to get the water on top of a chimney 25 feet high.

Respondents proposed to prove by C. V. Evarts, the following:

That he attended the fire which burned the residence of Mr. Hamilton, September 20, 1898, in Dawson. That 400 feet of hose were used. Fire was within 400 feet of the pumping station of the Dawson Waterworks Company, said county (Terrell), the hose being attached to a plug of said company; and the water could not be gotten from the nozzle to the top of the veranda 12 feet high.

Respondents proposed to prove by W. E. Riordan, the following:

That he was present at the lumber kiln fire in Dawson in 1896; and that the pressure of the water from the hydrants of the waterworks company, was not sufficient, during his observation, to throw the water ten feet from the nozzle.

185 The MASTER: The question now under consideration is not the effect of this evidence, but its relevancy to the extent

of making it admissible. Should the master err in excluding testimony, the result would be to put the parties to additional expense, cost and delay; and for that reason I am liberal in my views, that is, I try to be, as to the admissibility of testimony. Nevertheless, if I am clear that testimony is not relevant, and should not be admitted, I feel I should not admit it.

Now the contract in this case provides for the construction of a system according to specifications given, and that there should be erected a reservoir of a certain capacity; and of such a height as to afford a pressure under the circumstances stated in the ordinance. As to the system, it is provided that the system shall be thorough and complete; and that a supply of water for the purposes stated shall be maintained. I think that imposes on the waterworks company the duty of maintaining an efficient system and of keeping a sufficient supply of water on hand.

Now any evidence showing that this reservoir was not of the required height, would be entirely admissible. Any evidence showing that under the test provided in this contract, or under conditions substantially the same, showing that the contract was not complied with, I think would be admissible. I shall permit you to prove that the tank leaked. You may introduce evidence to show, if you choose and can, that the tank was not kept filled with water. You may also introduce evidence to show, if you can, under these conditions, or conditions substantially like these, that the pressure was not sufficient to raise the water 50 feet vertically, in still air. I shall permit you to show that there was a total failure of pressure for a greater
or less length of time; and if the failure is total, then there
186 is no pressure.

I hardly think we can go into the realm of speculation as to what the pressure would be under conditions which vary substantially and materially from those laid down in the ordinance. In other words: whether the water pressure was weak and continued so for a short length of time under conditions that surrounded the lumber kiln fire. I hardly see how that illustrates the issue at all. I will permit you to introduce evidence to show that the company has not in any respect maintained its system as it should have done. As I have admitted evidence to show that there was a new tank made, I will admit evidence showing that the tank leaked. You may show that the pipes throughout the city were not properly maintained or flushed; and that the source of supply has been allowed to be contaminated; and that the service was improper. I will permit all that; but I don't think I should permit evidence as to what occurred at particular fires under conditions totally dissimilar from those stated in the contract.

Mr. GUERRY: Your honor's ruling, as I understand it, I would like to show in the record, as invoked upon the offer to prove certain facts, which I have stated, by those particular witnesses, your honor rules I cannot prove.

The MASTER: You stated what you expect to prove?

Mr. GUERRY: By way of illustration.

The MASTER: In conformity with my general ruling, I will exclude the evidence offered, unless it is proposed to show in connection therewith that there was a total failure of pressure, or that the surrounding circumstances were substantially the same as those laid down in the contract for a test. If you can come up to those conditions you may proceed."

187 The city says that the rejection of this proposed evidence by the master was material error of law on a vital question in the case, viz: whether the system of waterworks as constructed and operated, came up to the requirements of the contract as to pressure, the evidence being relevant and otherwise competent; and the city insists upon a reopening of the case that this testimony be heard and reported and considered and given due effect, together with such other testimony of the same character as said witnesses would give upon re-examination, in connection with the testimony already reported on the same issue.

II. The city says that the two principal issues of fact necessarily arising under the law and actually made by the allegations of the bill and answer, were as follows:

First. Whether the waterworks company had performed its contract as to pressure, both in the proper construction of its system and in its service.

Second. Whether it had performed its contract in the kind of water supplied.

The city says that the master erred in law in failing and refusing to decide both of these questions.

III. The city submits that one of the material issues arising under the law and actually made by the pleadings in the case, was whether the waterworks company had performed its contract as to pressure both in the proper construction of its system and in its service; and the master failed and refused to make any finding upon this issue, either the one way or the other.

188 The city says that the master in such failure and refusal, committed an error of law.

IV. The city submits that one of the material issues arising under the law and actually made by the pleadings in the case, was whether the waterworks company had performed its contract in the kind of water supplied; and the master failed and refused to make any finding upon this issue, either the one way of the other.

The city says that the master, in such failure and refusal, committed an error of law.

V. The city says that the master erred in law in finding for the complainant against the city in recommending any relief whatsoever or any recovery of any sum whatsoever, because the complainant's right to recovery and relief depended upon the performance on the part of the waterworks company, of its contract as to pressure, both in the proper construction of its system and in its service, and upon performance of its contract to supply the right kind of water

to the citizens, viz: water suitable for domestic, sanitary and other useful purposes, and there was no finding by the master that the waterworks company had performed its contract in either particular, the master properly failing and refusing to find in favor of such performance.

VI. The city says that the master erred in law as follows: In finding and recommending that an injunction be granted the complainant against the city, that the city pay the complainant the sum of the water rental due and unpaid from January 1st, 1896, with interest on each installment thereof as the same matured,
189 at the legal rate of seven per cent. per annum after maturity, and that the city be required to specifically perform the contract forming the subject of the suit, when under the law and under the pleadings, there was no right of recovery or relief on the part of the complainant against the city, without performance on the part of the waterworks company of its contract to continue, during the existence of the contract, to furnish a sufficient supply of water to produce a pressure on the mains such that from any hydrant located on the principal streets, a stream of water would be projected fifty feet vertically in still air, through one hundred feet of fire hose, with a one inch nozzle attached; and to supply the city and its inhabitants with suitable water for domestic, sanitary and other useful purposes; when the master had not found and does not find that said contract had been performed but in effect on the contrary finds that the same had not been performed, in his findings of fact numbers eight and nine in his report, as follows:

Finding of Fact No. 8: "The source of water supply adopted by the water company from among those designated by the city consisted of a running stream, into which directly flowed the water of what is known as Dunn's spring, some four hundred yards above the take-in of the water company. These waters were among those analyzed by the State chemist, and by him pronounced safe and pure. The water shed does not cover an extended area. The stream from above flows through land which is more or less marshy, and upon which there is considerable vegetable growth. The surface water from adjoining hills on one side of the stream flows in above the point of supply. On the crest of these hills are several small residences, the washings from whose premises flow into the stream. There is also on the water shed a scaffold, which has been used from time to time for the slaughtering of cattle
190 in a small way. The stream from which the water supply is derived is not protected from these surface washings by means of dikes or other devices. The condition of the water shed is substantially the same as it was at the time of the selection and as it has been since. The evidence does not disclose when the slaughtering of cattle began, or how extended it has been. The water is not filtered but is taken directly from the stream and pumped to a standpipe or reservoir in the city, from which it is distributed by gravitation through mains and pipes to consumers.

I find from the evidence that at certain seasons of the year the water is safe and pure, as shown by the analysis of the State chemist; at other seasons, during periods of continuous rainfall, the water is muddy and must to some extent be contaminated by reason of the surface washings from the watershed as described. It was disclosed in the evidence that an analysis of the water had been made at the instance of the city or some of its citizens, but this analysis was not offered in evidence, nor was any expert evidence as to the quality of the water introduced, excepting the analysis of the State chemist as above referred to."

Finding of Fact No. 9: "The water company erected a reservoir exceeding in capacity that required by the contract. The height of this reservoir from its bottom to the surface of the earth below was 65 feet. Upon a test by the city it was ascertained and declared that the system met with the requirements of the contract, and I therefore find that the reservoir was of the prescribed height and capacity. Much evidence was introduced and offered to show that sufficient pressure had not constantly been maintained. It appears that on one occasion the reservoir was found to be empty, but this occurred shortly after the construction of the waterworks and
191 before the repudiation of the contract by the city, and is therefore not material to be considered in the present case. At times the reservoir leaked. On one occasion the local superintendent of the water company tested the pressure from a point on what is known as an end pipe. The water failed to reach a height of fifty feet vertically. It was shown that this test was a voluntary act of the local superintendent, without notice to the officers and owners of the water company or to the city. Gauges indicating the height of the water in the standpipe, and the consequent pressure, were placed at the pumping station of the water company and also in the engine house of the city fire department. Excepting on rare occasions the reservoir was kept supplied with water sufficient to produce the required pressure. No complaint concerning the character of the service or the amount of the pressure was made to the water company until after the institution of the present suit. The water company has since erected a new reservoir of more than double the capacity required in the contract and of a greater height than the first reservoir. Since the erection of this new reservoir there has been no complaint or question as to the pressure."

VII. The city says that the master erred in law in his first conclusion of law in finding therein that the court had jurisdiction of the cause on the ground that a Federal question was involved. Such question depended on the existence of an exclusive franchise and it is clear none existed.

VIII. The city says that the master erred in law in his first conclusion of law in finding that there was equity in the complainant's bill and that therefore the same should be maintained, be-
192 cause the city says that there was no equity in said bill and the complainant had a plain and adequate remedy at law for the enforcement of all of its rights.

IX. The city says that the master erred in law in his second conclusion of law in finding in favor of the complainant upon the question of *res judicata* as raised in the city's answer, the city having plead that prior to the filing of said bill and on the 14th day of March, 1899, the supreme *court of Georgia* in the case of the said Dawson Waterworks Company *versus* the said city, had adjudged that under the constitution and laws of Georgia and its settled policy, the contract sued on in said bill was void *ab initio*, and that complete performance on the part of the waterworks company did not estop or prevent the city from pleading the illegality of the contract and the complainant in the bill was a mere privy and assignee of the cause of action involved in the decision by the supreme court of the State and had become such since said decision, and that all the questions and issues made by the bill as amended were *res judicata* as to the complainant as well as to the waterworks company, and the facts so averred had been fully proved by a duly exemplified record in said cause from the said supreme court and had not been denied; because the city says that under the law and said undisputed facts, the said questions were *res judicata* and the said decision of the supreme court of Georgia upon said questions, was binding and conclusive upon and against the complainant and the contract sued on by complainant in said bill was null and void, and so adjudged to be. See sub-division No. 1.

X. The city says that the master erred in law in said second
193 conclusion of law in finding therein that the complainant was not a privy of the waterworks company as to the suit in the State court so as to be conclusively bound thereby, and that the doctrine of *res judicata* did not apply to it. Same sub-division.

XI. The city says that the master erred in his second conclusion of law in finding therein that the contract sued on by complainant was valid, notwithstanding the supreme court of Georgia had held such a contract to be invalid because in violation of the constitution of the State, in cases of Cartersville etc. *versus* Cartersville, 89th Georgia, 683—Cartersville etc. *versus* Cartersville, 89th Georgia, 689, and City of Dawson *versus* Dawson Waterworks Company, 106th Georgia, 696, and in holding that this court was not bound to follow said decisions of the supreme court of Georgia as to the validity of the contract in question; because the city says that under the law of the United States and under the decisions of the Supreme Court of the United States, it is the bounden duty of this court to follow said decisions of the supreme court of Georgia, because they were rendered in construing the constitution of the State, and a contract made in said State and governed by its constitution and laws; and because it appeared from the decisions of the supreme court of Georgia, that said court had never made any decision in point contrary to the decisions in the cases named. Sub-division No. 2.

XII. The city says that the master erred in law in the second conclusion of law in finding that the contract sued on did not create a debt in contemplation of the constitution of the State of

Georgia, because the city says that the contract did not only
194 create a debt or undertake to do so, but that it had been decided prior to the filing of said bill in the supreme court of Georgia that said contracts did create or undertake to create a debt, viz: in the case of Cartersville etc., *versus* Cartersville, 89 Georgia, 683,—Cartersville, etc. *versus* Cartersville, 89th Georgia, 689,—City of Dawson *versus* Dawson Water Works Company, 106 Georgia, 696; and other cases. Sub-division No. 3.

XIII. The city says that the master erred in law in his second conclusion of law in finding therein that the waterworks company had an exclusive franchise to occupy the streets and maintain a water system in said city by virtue of the said contract; because under the laws of Georgia no such franchise could be granted, and because if such franchise could have been granted by the city in any case, it would only be when said city had been expressly empowered to make such grant, and the said city had not been expressly so empowered under its charter or otherwise. Sub-division 4.

XIV. The city says that the master erred in law in his second conclusion of law in finding therein that the city after making the contract sued on with the waterworks company, had no right to establish and maintain a waterworks system of its own or use the streets of the city in competition with the waterworks company during the life of said contract, because the city says that such construction of the city's contract made the same the grant of an exclusive franchise by the city to the waterworks company, when the city had no power, in its charter or otherwise, to make such a grant, and when such a grant by any authority in the State of Georgia would be null and void because contrary to the express provision of the constitution of the State upon such subjects:
195 and because if the city had no power to make such a grant it had no power to estop itself from denying that it had made such a grant. A grant or contract that does not exist has no obligation. Subdivision 4.

XV. The city says that the master erred in law in said second conclusion of law in finding therein that there is no requirement in the contract that the quality of the water should be other than that furnished in its natural state from the source of supply designated and accepted by the city. The city says that as shown by the evidence and found to be true by the master at the time the water supply was tested and accepted, the same was suitable for domestic, sanitary and other useful purposes, and under the law of the contract it was the duty of the waterworks company to keep the same in such condition by protecting the same, or to put said water in such condition by filtering it, because the city respectfully submits that to test said water at a time when it was suitable and satisfactory and afterwards to allow it to become otherwise and to supply the citizens of Dawson with it when wholly unfit simply because it had been accepted when fit, would be not only a violation of the contract but a gross fraud upon the citizens and the city. Sub-division 5.

XVI. The city says that the master erred in law in the said second conclusion of law in finding therein that the city could not invoke a forfeiture or plead that the water supplied was not fit for domestic, sanitary and other useful purposes, as a defense to the right of the complainant to relief; because the city says that before the complainant could recover, the waterworks company must have performed its contract in this particular, especially as the com-
196 plainant had based its right to recovery and relief upon such alleged performance, and the city had denied the same, in the mutual pleadings.

More especially would this be true if the master is right in finding as a conclusion of law, that the contract of itself created no debt, and that it contemplated that the city should maintain and perform the water service therein specified from year to year for a period of twenty years, and that as this service should be performed the city obligated itself to pay therefor the sum of $2,000 each year, payable semi-annually, and that if the water company should fail to perform the services, the city would be under no obligation to pay. (For this finding of the master, see division 3 of the second conclusion of law.) Subdivision 5.

XVII. The city says that the master erred in law in its said second conclusion of law in finding therein that the complainant is entitled to an injunction against the city forbidding it to construct or maintain any system of waterworks of its own in competition with the waterworks company or for the purpose of supplying the city with water for fire protection and for municipal use and that the injunction heretofore granted temporarily restraining the city from issuing bonds for this purpose should be made perpetual. The city says that said injunction could issue only upon the ground that the waterworks company had an exclusive franchise to use the streets of said city for such purpose, when such exclusive franchise does not in law exist and cannot in law exist in the State of Georgia. Subdivision 8.

XVIII. The city says that the master erred in law in said sec-
197 ond conclusion of law in finding therein that the complainant is entitled to a mandatory injunction against the city and the waterworks company requiring them and each of them, to specifically perform the contract as essential to the protection of the security of the bonds; because the city says, first: that said contract is null and void under the constitution and laws of the State of Georgia; second, because said contract in a case between the waterworks company and the city had prior to the filing of the bill, viz: on the 14th day of March, 1899, was adjudged to be null and void; and because the complainant is bound by said decision as an alternative payee, acquiring as shown by the proof and found by the master, its right to sue subsequent to the rendition of said decision; and because under the law and undisputed facts, the said complainant was bound by said decision as a mere privy and assignee of the said waterworks company.

Sub-division 8.

XIX. The city says that the master erred in law in his said second conclusion of law in finding therein that the city and waterworks company should be required to specifically perform said contract, because the city says that said contract was not of such a nature as to justify the remedy of specific performance, especially so far as the city is concerned, because the city says that the justice of performance on its part would depend upon previous full performance on the part of the waterworks company, which previous performance on the part of the waterworks company, cannot be assumed in advance as a basis upon which to now decree specific performance hereafter on the part of the city. Subdivision 8.

XX. The city says that the master erred in law in his said
198 second conclusion of law in finding therein that the complainant was entitled to a mandatory injunction against both the city and the water company requiring them and each of them to specifically perform the contract as essential to the protection of the security for the bonds, because the city says that the law of specific performance does not provide that the two opposite parties to a contract may be required in advance to perform such contract for the benefit of a third person who is not such a party to the contract as to have any obligation thereunder to perform on its own part. Subdivision 8.

XXI. The city says that the master erred in law in his second conclusion of law in finding therein that the city should be required to perform the said contract by the payment of water rentals to the complainant thereunder; because the city says that under the constitution and laws of the State of Georgia, under which said city exists as a municipality and from which it derives all of its powers, has decided in construing this contract in a case between the city and the water works company, one of the payees under the contract and that one having control of said contract and having alone the right to collect the water rents at the time, the city has no power to make such payment or to lay any tax or to otherwise raise any fund for the purpose of making such payments; and because under such decision the use of any funds for any such purpose by the officials of the city, would be misappropriation of the same and would be violation by said officials of their official oaths. Subdivision 8.

XXII. The city says that the master erred in law in his said second conclusion of law in finding therein that the complain-
199 ant was entitled to a decree as against both the city and the water company requiring them and each of them to specifically perform the contract between them, because the city says that the law of specific performance is not applicable to such a contract, and is not an appropriate remedy in such a case. Subdivision 8.

XXIII. The city says that the master erred in law in his general conclusions as follows: In finding in the first division thereof that the objection to the jurisdiction was not well founded inasmuch as the jurisdiction rests upon the Federal question presented without regard to the citizenship of the parties, because the city says that

the alleged Federal question depended upon the existence of an exclusive franchise, which itself did not and could not exist under the laws of the State of Georgia, there being no interference existing or threatened as to the franchise of the water company to the extent that the same existed.

XXIV. The city says that the master erred in law in his general conclusions in finding in the second division thereof that the doctrine of *res judicata* was not applicable to the complainant in this case for the reason that the complainant was not a party or privy to the State court suit, because the city said that under the law the complainant was such privy and was under the contract as plead by complainant, an alternative payee with the water company and the said water company as shown by the proof and found by the master, was as such payee in exclusive control of said contract and the right to collect water rents up to and after the rendition of said decision; the complainant as shown by the bill suing as a subsequent assignee of the right as payee to collect said water rentals.

200 XXV. The master erred in law in his general conclusions in finding in the third division thereof, that this court was under no obligation to follow the decisions of the highest court of the State rendered after the contract in question had been entered into and the rights of the complainant and those it represents had been acquired thereunder, that the decisions of the State court prior to the execution of the contract were not so long and so firmly established as to constitute a rule of property and that this court will decide independently whether there is a contract and whether its obligation has been impaired, because the city says this court is under such obligation because said decisions were made in pursuance of decisions made to the same effect previous to the date of the contract and were made in construing a contract made in and to be performed in the State of Georgia, and in construing the constitution and laws of the State as applicable thereto.

XXVI. The city says that the master erred in law in his general conclusions in finding in the fourth division thereof that the contract between the city and the water company did not create a debt within the meaning of the constitution and the laws of the State of Georgia but that such contract was valid and enforceable, because the city says that such finding is an erroneous construction of the constitution and laws of the State and in violation of such constitution and laws as construed in its decisions in a number of instances by the supreme court of the State. The city further says that such finding of the master is also contrary to his own ruling in his own report upon the main issue in the case, viz: that the plaintiff had the right to recover such debt without performance and

201 without proof of performance and in the teeth of his own decision that there had not been performance on the part of the water company of said contract so as to entitle it or the complainant to recover water rentals on the ground that the same had been earned by a performance of the contract.

XXVII. The city says that the master erred in law in his general conclusions in finding in the fifth division thereof that the exclusive franchise granted by the city to the water company to use the streets and maintain its system of waterworks, cannot be revoked by the city in its own interests and that its value could not be impaired by competition on the part of the city itself within the term of twenty years during which the city obligated itself to take and pay for the water for fire protection, because the city says that there is no such exclusive franchise; that there has been and is no attempt on the part of the city to revoke any franchise really owned by the water company, and no allegation to such effect in the bill, and because the city does have the right under the constitution and laws of this State notwithstanding the existence of the legal franchise of the water company, to make other provision at the same time for the supply of the citizens of Dawson with water, especially when the water being supplied was unfit for their use. The city respectfully submits that if bound under the law to take and pay for the water of the company for fire protection, the simple and only right of complainant would be to sue for at law and collect the water rentals as the same become due.

XXVIII. The master erred in law in his general conclusions in finding in the sixth division thereof that the city cannot
202 under the facts of this case, forfeit the rights and franchises of the water company for insufficient service or for any failure to supply water of a higher quality of purity, nor plead such facts in bar of the equitable relief sought; because the city says that there has been no attempt on the part of the city to forfeit any of the rights of the water company on any ground whatsoever and none is alleged in the bill except the exclusive franchise which does not exist and cannot exist under the law; and because the city further says that the city certainly has the right to plead the failure of the water company to perform its contract in furnishing water suitable for domestic, sanitary and other useful purposes, to the citizens of Dawson, the right on the part of the water company to recover being dependent upon such performance and the complainant having no more or different right to collect rentals than that possessed by the water company itself. The city respectfully submits that it was the duty of the water company to furnish after the test was made, water of the same purity as that accepted at the time, and the master having found that such water was not afterwards so furnished, this finding of the master in favor of the complainant's right to recover and its right to the equitable relief sought, is plain error of law.

XXIX. The city says that the master erred in law in his first recommendation that the contract constituting the subject of the suit, be decided valid, binding and enforceable.

XXX. The city says that the master erred in law in his second recommendation that an injunction be granted to complainant pro-

hibiting the city from negotiating, selling or disposing of the
203 bonds authorized to be used in construction of a water system by the city, and from constructing or maintaining or operating any water works in the city of Dawson for the purpose of supplying either the city or its inhabitants with water for fire protection or domestic use; because the city says that under the constitution and laws of this State it is not only its right but its duty to do so, especially as it appears, as in effect found by the master in his report, that the said city and its inhabitants are not being sufficiently supplied with water for fire protection or supplied at all with water suitable for domestic, sanitary and other useful purposes.

XXXI. The city says the master erred in law in his third recommendation that the city be enjoined from revoking or attempting to revoke, the rights and franchises granted the water company under the contract during the term of twenty years within which it contracted to take and pay for water from the water company; because the city says that it was not alleged and does not appear that the city was attempting or threatening to revoke or contemplating any revocation of any of the rights and franchises of the water company under the said contract during the term of twenty years or otherwise.

XXXII. The city says that the master erred in law in his fourth recommendation that the city shall pay the complainant the sum of the water rentals due and unpaid from January 1st 1896 with interest on each installment thereof as the same matured at the legal rate of seven per cent. per annum after maturity; because the city says that the contract for the payment of said rentals, is null and void and has been so adjudged because violative of the constitution and laws of this State and because before the water company
204 or the complainant could recover such rentals or any part thereof, performance and proof of the same, of the contract on the part of the water company, was and is necessary, and because there has been no such performance and no finding by the master in favor of such performance or proof of performance, but on the contrary in his report a finding to the effect that there had been no such performance.

XXXIII. The city says that the master erred in law in his fifth recommendation to the effect that the collection of the taxes due the city should await an accounting for the purpose of ascertaining what might be due the water company by the city for such water as may have been used by the city itself; because the city says that the said taxes being due and being so held to be due, it is contrary to the constitution and laws of the State of Georgia to arrest process for the collection thereof for the reason stated by the master in such recommendation.

XXXIV. The city says that the master erred in law in his sixth recommendation that the city and the water company be required to specifically perform the contract forming the subject of this suit and to severally comply with their respective obligations arising and to

arise thereunder, and that to such end a mandatory injunction be issued; because the city says that if the water company was performing its contract as alleged in complainant's bill, there was no ground for a decree for specific performance on its part and if it was not so performing its contract the complainant had no right to recover water rentals, or to any of the relief prayed in the bill; and because the contract was not such a contract as can be specifically enforced
205 under the laws and practice in the United States courts, especially as to the city as in any view of it, performance on its part would be dependent upon performance on the part of the water company, and the court has no right to assume for the purpose of rendering a decree of specific performance as to the city in advance in the assumption that the water company will perform and that the city will not; and because this very contract has been decided by the supreme court of the State of Georgia to be null and void in a suit between the water company and the city and that the city was under no obligation to perform the same and that it had the right so to plead; and because it has been also held in said decision in effect that the city has no legal or constitutional power to collect from its citizens by taxation or otherwise, any moneys in discharge of any obligation under said contract, and the mandatory injunction as recommended would require the officials of the city to violate the constitution and laws of the State as construed in the highest court of the State, and to violate their official oaths. The city respectfully submits that while the water company is made a party defendant to said bill, no complaint was made therein against it by the complainant and no ground therein is set forth for a right of recovery or relief against the city or the water company and that therefore the complainant is entitled to no decree against said company for the purpose of reaching the city through the same or for any other purpose whatsoever.

XXXV. The city says that after being served by the master with the draft of his report and notified to appear and make suggestions of amendment and change of the same, the city so appeared on the 17th of April last and made the following suggestions among others:

206 That the master had omitted a material fact proved by the testimony of one of the witnesses of the complainant, viz: F. A. Ruggles (see Record p. 79) as follows:

That he (witness) removed the timbers of the old tank when it was torn down (since the filing of the bill) in order to construct a new one; that there was at that time in the bottom of said old tank, four inches (in depth) of foul and muddy sediment.

In making said suggestion the city submitted that inasmuch as a witness introduced by the complainant had testified to this fact and his testimony was undisputed it became an established fact in the case and one of vital importance as showing one of the causes for the contamination of the water supply and as a fact disproving the contention of the complainant that the waterworks company had up

to the time of the construction of the new tank, performed its contract in supplying the right kind of water for the citizens of Dawson; and the city thereupon suggested that the master report said evidence and a finding of the fact which it establishes. The master, admitting the truth of the allegations of the city upon this point, refused the suggestion on the ground the report should not be burdened with statement of the evidence but should be confined to the finding of ultimate facts.

The city now says that the master erred in law in not making such report and finding originally and in not doing so in compliance with said suggestion, because the city says this evidence was too brief to be burdensome and that coming from a witness of the complainant and not being contradicted but largely corroborated, it established a vital as well as ultimate fact, viz: that the water supplied by the water company to the citizens by means of the old tank, was unsuitable for domestic, sanitary and other useful
207 purposes, and that therefore the water company had failed to perform and was at that time failing to perform its contract as to the kind of water to be supplied, and that therefore the complainant was not entitled to any recovery or relief.

XXXVI. The city also submitted as a suggestion of change of the original draft of the master's report as follows: That Mr. James H. Dawes, superintendent of the waterworks company, as a witness for the complainant, testified as follows: (See p. 115.)

"The Dawson Water Works Company had charge of the original litigation and all these demands against the city of Dawson for water rentals up to the decision of the supreme court of Georgia already referred to."

The city then and there submitted that as this testimony was from a witness of the complainant and was undisputed the fact was established, and being a material one should be reported to the court, and requested the master to make such finding in his report. The master refused said suggestion on the ground that such testimony could be burdensome though brief and because the finding would not be of an ultimate fact. The city says the master erred in law in not having reported said evidence originally and a finding in accordance therewith and also in not doing so as suggested because the city says that by means of such testimony of the witness of the plaintiff, the fact became established that the water company as one of the alternative payees under the contract, had charge of the original litigation on all the demands against the city for water rentals up to the decision of the supreme court of Georgia already referred to, and was therefore concluded as to all of such demands and the complainant having sued as alternative payee upon assign-
208 ment subsequent to said decision, was also concluded thereby as a privy.

XXXVII. The city shows that it also made the following suggestions of change in the master's report, viz: That J. A. Horsley,

superintendent for the waterworks company and witness for complainant, testified as follows: (p. 130.)

"My recollection is during the year 1900 and maybe 1899 and 1900 during the very dryest season, the pressure went down three or four different times. It was run down so there was no pressure. Several times early in the morning it would not run out of the hydrant. It was this way I suppose two or three times."

The city submitted that this evidence being from the complainant's witness and not being contradicted, the facts testified to became established and were material on the question as to whether the water works company complied with its contract in keeping up its pressure, and ought to have been reported in a finding of such fact by the master; and requested the master then and there to make such finding, and the master refused. The city now says that on so doing the master erred in law, because said facts being testified to by witness of the complainant and not contradicted but largely corroborated, were established, and that by reason of such facts the proposition was also established that during the year 1900 there was a failure to the extent described on the part of the company to keep up the pressure as required by the contract, and at times to have any pressure whatsoever; and that therefore the complainant had no right to recover. The city respectfully submits that in such a contract for fire protection, the constant existence of the required pressure is vital and of the very essence of the same and that upon the failure of such pressure as described by the witness,
209 without sufficient excuse, such a contract would be entirely broken and all right of recovery and relief destroyed.

XXXVIII. The city says that it also submitted as a suggestion of change that said J. A. Horsley, witness for the complainant, testified (page 135) as follows:

"Occasionally they (the people) would tell me in effect that the water was muddy and unfit for use and smelled badly, and the pressure was insufficient, for instance on these water ends, and asked me to flush that main so the water would clear up, and I would do it. They said the water was muddy. Once or twice they would tell me about its being muddy—several times about its being muddy, and once or twice about its being somewhat smelling bad. During that time I remember complaints made several times about the pressure. My recollection about the first complaint was made during the Whitehard and Green fire in 1897. I have seen buzzards up there (on the tank) in the day."

The city then and there submitted that these facts testified to by witness for the complainant and not being disputed, were established and material, and ought to be reported, but the master refused said suggestion. The city now says that the master in doing so, erred in law, because the city says the said evidence brought home notice fully of complaints both as to pressure and as to the unsuitability of the water and also notice that the company was not performing

its contract as to pressure or kind of water, and was therefore an ultimate and controlling fact to be found by the master.

XXXIX. The city shows that it also made to the master the following suggestion of change in his report: That inasmuch
210 as the two principal issues of fact in the case were as follows: First, whether the water works company had performed its contract as to pressure both in the proper construction of its system and in its service; and second, whether it had performed its contract in the kind of water supplied; the master should have found in the negative both propositions, but the master refused said suggestion. The city now says that the master erred in law in such refusal and in his failure to have so found originally, because the master's own report in his findings of fact numbers eight and nine, showed that he had reached such conclusion; and such a finding would have been conclusive against the complainant on all right of recovery or relief.

XL. The city says that the master erred in law in finding and recommending any recovery or relief in favor of the complainant, because under the law and the pleadings, and the facts as found by the master himself, there was no right of recovery or relief in the complainant.

The city respectfully submits that the master misconstrued the contract and misconceived the issues made by the law and pleadings in the case.

Under the law and the pleadings and the contract sued on, the material issues were whether the water company had performed its contract with the city by furnishing it with the proper degree of water pressure and by supplying its citizens with the proper kind of water, and before the complainant had any right to recover it was incumbent upon the complainant to prove that the water works company had performed its contract in both of these particulars during each period of time for which the complainant sued to recover and to prove that during the entire time it had performed its
211 contract in both particulars in order to entitled it to injunction for any purpose, or to any decree for specific performance. The master makes no formal finding upon either of these issues but does report findings upon the evidence in his findings of fact numbers eight and nine, which clearly negative the proposition that the water company had performed its contract in either particular, and yet he finds in favor of the complainant in toto so far as the relief sought by it is concerned while formally ignoring the real issues of fact in the case as distinctly raised by the complainant's bill and the city's answer, basing his finding so far as these questions were concerned, upon the erroneous conclusion of law that the city had no right to plead and defend on the ground that the water company had failed to perform its contract, because the city as found by the master had failed to make such defense as against the payment of water rentals up to the 1st of January, 1895,

and had renounced the contract in 1894 on the ground only that the same was illegal.

The city respectfully submits that it was not estopped at law or in equity for any such reason, from defending on the ground of non-performance subsequent and during the years now in question.

It further submits that the obligation of the water company under its contract was not simply to construct a system that would at a given time and under prepared conditions produce the required pressure, but that after constructing such a system that it would keep it in the condition to produce such pressure at any and all times for the extinguishment of fires which are liable to occur at any and all times and without notice.

The city further submits that the further obligation of the water company in said contract was not simply to have at a particular time and under favorable conditions a kind of water
212 suitable for domestic, sanitary and other useful purposes so as to successfully stand a test, but it was the duty of the water company to always have said water in as good condition and as suitable when supplied to the citizens either by protecting the water from contamination or cleansing it after becoming contaminated.

The city further submits that the tests of pressure and of quality established the facts at the time that the system in its then condition could produce the pressure and that the water in its then condition was suitable, and also established the standards of capacity and quality which it was incumbent upon the water company to maintain.

The master erred in law in holding in effect that these tests established conclusively that the pressure and quality had thereafter been maintained.

The city further submits that all the findings and recommendations as above stated in favor of the complainant, were erroneous in law in so far as they depend upon the findings of the master as matter of fact that the city had been using the water of the company for the extinguishment of fires, as creating an estoppel, because the city says that such could not be true either in law or in equity except to the extent of the value of the water so actually used, because the city says that under such a contract for such a purpose the use of the water or attempted use of the water by the city for the extinguishment of fire, would not create an estoppel if the city should seek to save its inhabitants and their property from destruction and to such means as were at hand for that purpose, especially such means as would be supposed to have been provided for such purpose. To apply the doctrine of estoppel in such a case would be to put every city in the
213 power of its water company because the latter could by making pretense of a supply of water, reap all the benefits of an actual performance of its contract and the city by an attempted use of the water would become bound to pay for the same whether the use and benefits of the same were enjoyed or not.

Besides, the city respectfully submits that since the grant of

the temporary injunction in the case, to-wit, on the 16th of September, 1899, the city has had no authority without violating the same, to prevent the use of the water of the company by its officials, or otherwise, and therefore such use would not be binding upon the city by way of estoppel or otherwise.

The city further submits in support of this exception of law, that both by the terms and nature of the contract, the water company was bound to perform the same or tender such performance as would be equal to performance being at the time prepared to perform, if the obligation in said contract both as to pressure and as to kind of water, before it could demand acceptance of or pay for, performance as to either of the obligations of the city.

XLI. The city says that the master erred in law in recommending and finding as matter of law, that the city shall pay the complainant the sum of the water rentals due and unpaid from January 1st 1896 with interest at seven per cent. per annum after maturity, because the city says the master has made no finding of fact to this effect or upon which to justify such a recommendation or finding of law.

May 23, 1903.

GUERRY & HALL,
J. A. LAING,
M. C. EDWARDS,
Att'ys for the City.

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Exceptions of Fact.

I. The master erred in his sixth finding of fact in finding as follows:

"That no other means for fire protection was afforded by the city (than that of the water company) so that it must have been recognized that in an emergency of fire, resort to the use of the water of the water company was necessary and inevitable and that the city did not forbid the use of this water by its fire department and must have known that it was being continuously so used."

The city submits that the evidence showed that the city had other means for fire protection, viz: the same it had before the waterworks were constructed. That the city did forbid the use of the water by its fire department ans that it had notified the company directly and through its superintendent Horsley, that the contract was at an end. In support of this exception the city refers to a finding of the master in this same finding of fact, to the effect that the city on the 14th of December, 1894, notified the water company that unless a new agreement could be reached between them as to the subsequent use of the water for one year from January 1st, 1895, it would not be liable under the contract after the date named; and that the water company declined to enter into any new agreement, etc.; as well as the proof in support of this finding.

In further support of this exception of fact, the city refers to the following testimony:

That of A. J. BALDWIN, mayor, who testified as follows (as will appear on p. 342–3 of the evidence):

"I was mayor of Dawson in 1894–95–96; remember the action of the mayor and council relative to the abandonment of the contract with the water works company in August, 1894. After
215 that I wrote the water works company at the request of the council, in December, giving the company notice of the action of the city. The letter is the one that is in evidence. I gave notice to Mr. Horsley, the superintendent the latter part of '94 or early in January, I think in 1894, that the city would not be bound for water any more. I also notified Bill Patterson, the colored fireman and R. A. Bishop, foreman of the Mechanics' Fire Company. When I notified Horsley I told him in substance about the letter I wrote that the city was not bound for the water any longer; that we were not going to carry out the contract made by former council. We did not consider it binding; that the council had repudiated the contract. I told him council would not be liable for any water." (For letter of Baldwin referred to, see report of evidence, p. 329.)

Page 347 *et seq.* (BALDWIN) "The city had same volunteer fire company after January 1st, '95 it had before. City didn't exercise authority over fire company 1895–96–97–98–99, but gave tax exemptions. It was necessary to have fire company to operate the engine and chemical engine we had even if there was no waterworks. We had a supply of water independent of the waterworks, in six cisterns in the street. The city gave no direction to firemen or fire organization during the years named to use water of company; never gave them any authority to use it; they knew the contract had been abandoned by my having notified the parties. They had no authority so far as the city was concerned, during these years, to use the water of the water company. If the city gave any direction for them to use it that I knew of. The mayor gave no such direction or permisson. After '94 I never did, and never empowered any one else to do so. (Page 376 *et seq.*) I was mayor in '95. Was at
216 bakery fire. The people used the company's water there. My recollection is that I took hold of the hose then as I have at all fires. I do not think that I handled the nozzle. I didn't assist as mayor any more than I did when I was not an official. I helped use some of the water. Even now if I go to fires and see it is necessary I take hold. I did at any time during 1895–96–97. I was mayor during these three years. I always took an active part; helped to use the hose. I did take hold of the nozzle if I could use it. If Mr. Horsley ever notified me that they expected the city of Dawson to pay for the water, I don't recollect it.

Dr. J. G. DEAN, witness (page 396 *et seq.*)

"Member of council since '93 to present time. During this time have seen water used by any and every body; saw people to whom city had given exemptions use water just as individuals; was present and saw it. Think other members of the council were present and saw it. Never forbid them from using it, strictly, so far as I know; used the apparatus kept in the building belonging to the city, which were returned after the fire; returned by those who had exemptions and others. Bought new hose '95 and '96. Had the same arrangements after January, '95, we had before. Fire engine not used except in a few of the fires; not over two or three.

R. L. MELTON, witness (page 435 *et seq.*)

"In 1894–'5 was alderman and chairman of fire committee which had especial jurisdiction over fire department. Remember action of council in 1894 in renunciation of water company's contract. Soon after that had two cisterns pumped full of water and Roberts overhaul engine. This was about the 1st of 1895. The fire company had a row about that time and went to pieces. Bishop man-
217 aged one of the fire companies at the variety works. I notified him we had nothing more to do with the city waterworks and must have nothing more to do with the hose. The city waterworks attached their hose to the variety works. I told Mr. Roberts we had no contract with the waterworks company and he could not use their water any more.

JOHN SEAY (page 443 *et seq.*)

"From 94 to 98 I was chief of police, this city. The organization of the fire department was very poor, I thought. I was member of the fire company. The paid fire department was organized about 1899. Up to this time, during those years, most everybody in general that got there first, did the work of putting out the fires. It was the work not of any particular organization, but generally of the crowd that assembled. I always tried to get there. I remember one time taking the reel over to Dr. Dean's; don't think there was a man that belonged to the fire company there except Robert Baldwin. He helped to pull it over there. There were sixteen in squad. We were the only two firemen in it; and two negroes helped us, not members.

CHAS. DEUBLER, (502–3)

"Resident since '73. Have been in council off and on ever since have been here. Have been chairman of the fire committee, engineer, etc. Engineer ever since they got an engine, except one or two years I quit. I have had experience in dealing with water for fire plugs and engines, hose and nozzle, for the purpose of extinguishing fires, ever since I have been here. I think since they bought the engine in '85, somewhere along that time. Since then

have been familiar with the different kinds of apparatus
218 the city owned for fire purposes, which consist first of a chemical engine, 120 gallons, hose reels, steam fire engine, two reels. During those years they kept from 600 to 1500 feet of hose. One reel carried 600 the other 400. The nozzles run from half an inch to an inch.

II. The city says that the master erred in finding in his sixth finding of fact, as follows:

In finding that notwithstanding the city has repudiated the contract it has continued to enjoy the fire protection afforded by the waterworks company and to use the water for the purpose on every occasion in the same manner and to the same extent that it did prior to its repudiation of the contract.

The city says that the proof showed not only a renunciation of the contract by the city, but the abandonment by the city of the waterworks system and the means it afforded for the extinguishment of fires and that the use thereafter of the water of the company for the extinguishment of fires, was by the people indiscriminate, including the officials of the city, who were acting in their natural capacities and not as officials and not as such being authorized so to act.

In support of this exception, the city refers to the evidence briefed in the foregoing exception of fact, viz: exception of fact No. I, and also to the injunction granted in the case on the 16th of September, 1899, and submits that the master erred in fact in finding that any use of the water was the act of the city, after the grant of said injunction or the renunciation of the water contract in 1894, as shown by the undisputed evidence and the finding of the master thereon.

219 III. The city says that the master erred as follows in his eighth finding of fact:

First. In making a partial report only of the facts.

Second. In finding that the condition of the water works is substantially the same as it was at the time of the selection thereof and has been since, because the evidence showed that the scaffold and butcher pen and the slaughter of the cattle and the leaving of the offal thereat, were begun, maintained and carried on after the selection of said source of water supply.

Third. In not finding the causes of contamination as shown by the evidence and not disputed.

Fourth. And in not finding as a matter of fact that the causes of contamination, viz: the slaughter of cattle, the leaving of offal and the presence of surface closets, lots etc., at residences within the area of drainage, were without the limits and jurisdiction of the municipality.

Fifth. In not finding that the waterworks company had failed after full notice of the causes of contamination, to protect the said water supply therefrom.

Sixth. In not also finding that because of such contamination and

under the undisputed evidence of many witnesses in the case, the water of said company furnished to the citizens of Dawson, was so muddy, filthy and offensive to the smell, as to be unfit to drink or use in cooking or in washing clothes or bathing.

In support of these exceptions of the master in his eighth finding of fact, the city submits the substance of the following testimony:

First, that of JOHN SEAN. (P. 456 of evidence)

220 "Was marshal of city 1897–98–99; during that time complaint was made to in about something stinking at the branch at the source of the waterworks. Mr. J. A. Horsley, superintendent of the waterworks, and I went up there and in about fifty yards of the mouth of the inlet pipe where they get their water from, in the stream that runs into the inlet pipe, there was a dead horse. His rump was in the water. He was in a very bad fix; he was rotten. When we pulled him out, the hide and stuff would slip off. Made the negro pull him out. Mr. Horsley was there but I don't remember whether he saw the horse pulled out or not. I think he made the negro do it. I think the complaint was made by somebody, and Mr. Horsley went up there hunting for it; did not know at the time it was up there. I don't think Mr. Horsley knew it was there until that day he went up there and hunted for it. The complaint was probably made to Horsley, and me and Mr. Horsley went up there together. I don't know that I knew it my duty to protect the water supply. I knew it my duty to move it as soon as I found it there. It was out of the city limits, probably forty or fifty feet."

J. W. F. LOWREY, witness (pages 464–5–6–7–8)

"Am mayor of Dawson. I know location waterworks company's plant and surroundings; have seen source of water supply and arrangement by which conducted; where it is appropriated by the company; have examined all the premises up to as far as a spring is designated from which water was to be used to supply the town; Dunn's spring. The branch extends a great way beyond that. The land through which this branch flows and in which the springs are located, above the waterworks company, is a dark, murky, muddy swamp; and the conformation of

221 the land, especially on the west side, is situated so that all the washings from six or eight residences and the other houses, are necessarily thrown into this branch. That drainage is now contaminated by the surface washings from privies, horse lots and the butcher pen. The driftings from these places all run into this branch. The whole swamp is very largely covered with vegetable matter, especially above Dunn's spring. Nothing whatever has been done by the water works company to protect this spring or their outlets or this branch above the mouth of the inlet pipe which leads into their waterworks; and as nothing in the way of protection to prevent the flowing of the surface waters from these settlements I have spoken of along the whole side on the

west, into these springs and other branches and the main branch above the inlet pipe, it is an absolute fact that all this water does flow into that place. I have had in my family as much experience with this water of the company as is possible for any family to have, I suppose; have had the water in my house and yard since the beginning. The water has varied. In dry weather the water is clear and apparently fit for use, and but for the fact that we knew the contaminated sources from which it came, we might use it for drinking purposes. I have never used it for that purpose because of the source from which it is brought. Sometimes it is very nice for bathing and sometimes it is wholly unfit for bathing. It is permeated with mud, as red as mud can make water by flowing into it; I could not tell what proportion of time. I know this; we have not had any rain here of any consequence in eight or ten days, and the water has not cleared up from it yet. I have tried to use the water for bathing purposes; generally use it in bath tubs. I have on several occasions filled the bath tub with water and it was so bad I could
222 not use it; let it out again. Used it almost every week for bathing purposes. It is very objectionable, still we have no other source from which to get bathing water. It is not at all fit, I think, for laundry purposes; never heard of anybody using it for that. Hardly fit for cooking purposes; still we used it for that; boiled it; by that means we hope to destroy the germs, disease producing germs, that might be in it. We use it for that because it is so inconvenient to get other water. Some have built an artesian well in our neighborhood because of the fact that it is unfit for use for drinking. The neighbors joined in and dug an artesian well. This has been done by two or three others in town that I know of; maybe three.

A. M. RAINES, witness (pages 483 to 487 inclusive).

"I know Adams' butcher pen testified about. It is located 200 yards, to the best of my judgment, above the inlet pipe they get their water from. The drainage from this butcher pen flows into the branch the water company gets its water supply from. This butcher pen has been used almost continuously for the last three or four years. The cattle that are butchered are kept right there. The offal is thrown down there on the ground; from where the drainage goes into the branch that the water company get their supply from. The butcher pen is for the public market. I have a farm beyond this butcher pen and I go backward and forward to the farm and have seen beeves butchered there on various occasions. I have used the water of the company since 1898. It has been very muddy and filthy at various times. Sometimes it would stink. We have never drank the water at all; have been afraid to drink it. We tote water from the artesian well to drink; cook with this water sometimes. The time it got to stinking so bad we quit using it for drinking purposes.
223 Where this butcher pen is located is on the private property of Mr. Adams and outside of the city limits.

R. J. SEWN, witness (pages 487 to 491)

"Am butcher. Butchered out here at Mr. Adams four months year before last; know where waterworks station is; the butcher pen is on the hill about 300 yards above the station. Year before last during four months I butchered out there, sometimes three cows a day; sometimes one every day; left the offal there; hogs got some of it; don't know what went with balance; suppose the buzzards got it; saw buzzards there. By offal I mean the entrails of the animals and contents. Don't know of any occasion when the offal was taken away. The surface water from there went into the branch that supplied the water works I have seen cows butchered there this year since Christmas. Some days I wouldn't kill any cattle out there at all; some days would kill one; some days four or five; three or four. Didn't keep the place clean; offal left there on the ground; Adams had hogs there; they had access; Adams house about 300 yards.

R. F. SIMMONS, witness (pages 478–80)

"Know pumping station waterworks company and where they get the water from; know the creek well; know there is a butcher pen two or three hundred yards above; northwest; above waterworks station two or three hundred yards. I don't know any way the water could go from there except towards the creek; I know the butcher pen has been used; have seen them butchering several times; they throw the offal to the hogs; have seen them eating it; that butcher pen has been there two or three years, maybe more. Adams kept the market here in town and supplied the town
224 to some extent. I think the butchering has been going on there two or three years."

W. F. LOCKE, witness (pages 496–97–98)

"Have been using water of waterworks company seven or eight years. Used it possibly two weeks for drinking purposes two or three years ago. Later I got the boy to bring us water from the pump in the business part of the town. Bought a filter and used the water of the waterworks company for ten days or two weeks, and quit using it on account of the filth that had accumulated in the filter. At times the water is muddy and unfit for use. On one or two occasions odor was so bad would not use it for drinking purposes but had water brought from well; that was about four years ago; think I have used the water since 1894. Have not noticed any offensive odor the past year or two. I noticed once or twice the first year I moved around where I am now living. I detected offensive odor more than once or twice. Two occasions I refused to bathe in the water because of the offensive odor; possibly noticed it four or five times; don't think that that was when the water was very muddy; don't remember whether the water was very low; don't know what caused the offensive odor, but don't think it was from mud; never used it for drinking purposes except the two weeks that I spoke of.

225 WALTER CHRISTY, witness, (pages 499–500–1)

"Living here about twelve years; know property of waterworks company; well acquainted with the surroundings, and the creek and the spring up there; I lived out there at my grandmother's a year; '90 or '91; since then have visited up there frequently, constantly. There are some houses on the hillside on the west, and a butcher pen about 150 yards from the stream up there that supplied the waterworks. Mr. Adams did the butchering there for two or three years back. I understand he used it in December of last year. He used it for butchering cattle; I have been there and seen him butchering a good many times; I suppose 30 or 40 times during the last two years. *Of* offal and excrement from the cattle is left on the ground for the hogs; don't know that they always consumed it. In case of rain the surface water from where the offal was thrown, where this butcher pen is located, goes into this branch, from which the pumping station gets their water. No other source for it to go to. Don't know whether they are using the butcher pen now or not; have not been there since February or March. Sometimes there would be more offal than at others; sometimes two cattle; that is as much as I have seen at one time. Have seen offal there when fresh and when it had been there for sometime; about one hundred yards from the creek; never measured it. I know it is on the hillside, and there is no other way for the water to go except into that stream. Where the cattle is butchered there is a slope towards the branch. The ditch goes from the pond into the creek. From the butcher pen it does not drain into the pond. The pond is back in another direction. The pond is dry most of the time. The ditch from the pond runs into the branch.

226 Dr. L. C. GONEKE, (pages 530–1–2–3)

"Practicing physician eighteen years; lived in Dawson twelve years. Have been using the water of the waterworks company ever since but until last two months. Drank it for a short while; used it after that for irrigating garden, yard, and for bath tub, kitchen, watering stock, etc.; could not use it as drinking water; caused indigestion. Wife and I quit using it on that account. Used it for bathing purposes. At times it would not be used at all. Entirely too muddy and had an offensive odor. Quite a number of times this was the case during my experience with it after rains. I attributed it to the effect of rain on the water. Peculiar offensive odor when I turned it on in bath tub; didn't use it at all; impossible to say how many times; quite a number in my experience. About as definite as I can be, I suppose about six or eight times in one month and once in two or three months. I attributed it to the rains. In dry weather water was very clear and very good for stock uses and bathing purposes. Could not use it as much as I needed for irrigating purposes. At that time I was notified to hold up on it, by Mr. Horsley the superintendent. That was the time when I appeared to need it particularly for irrigating; paid for it during the

winter when I had no use for it. I state as a physician, having used this water and having had experience with it, I consider it very unwholesome. Not speaking as a physician, I consider it good for bathing purposes except at times when it became muddy. I consider it good for cooking purposes as soon as it was boiled. Quite a number of times I could not use it for irrigating purposes, in the summer when it was very dry; could not tell what year; near midsummer. I could not tell you to save my life what year, only from being put on notice several times during my experience with
227 the water. Not the same summer; three or four summers. They have been every summer I use it; I cannot be positive about the number of summers. Quite a number of times; six or eight times; something like that; don't think all one year or season. When I was notified to that effect it was during exceptionally dry times in summer.

J. S. LOWREY, (pages 545–6)

"Have lived in Dawson twenty-five years; in '92 lived on Main street; had water pipe run in rear door to be used for cooking purposes; tried to use it for cooking purposes and could not; muddy and had a bad odor in '92, in the spring and summer. We cut it off then and since I have been living on Lee street and tried it again this summer; tried it last year. Got it in my yard and every once in a while I try it; same trouble was the result last year and the same trouble this year; had red color to it and is offensive. Was a member of council in '94. Made no complaint officially; made no complaint personally or request for improvement. I quit it.

Dr. A. R. LAMAR, witness, (pages 547–8–9)

"Physician eight years; been living in Terrell all that time; Dawson two years and a half or more. Have had experience with the water of the Dawson Waterworks Company; have been using it for irrigating garden and in barn; have used it part of the time for cooking purposes and in the bath room; did not use it for drinking purposes; found it was bad; had an odor that was offensive. I also saw if you draw it from the hydrant and let it stay over night in the pitcher it would have an odor about it; would have an odor most of the time after setting awhile. I considered it unwholesome, so much I did not drink it. It was all right for cooking purposes if boiled. Have never used it for drinking purposes when I
228 could get any other; been using artesian water from town pump. What I say about this water is based on actual test, so far as drinking. I have noticed it is offensive; very often. If you draw it out of the hydrant and let it stand over night in bucket or pitcher, it will always have a bad odor. I have let it stay over night in a bucket or pitcher to see, about 365 days in a year. It is not always offensive in the morning, but nearly always so. Running water, as I understand it, purifies itself by coming in contact with the air, and standing water especially if there is any nitrogen-

ous matter in it, putrifies. My idea is that standing all night in a pitcher, it putrifies. If the water was pure I would not expect it to putrify. I mean by nitrogenous, matter in it; vegetable and animal matter; inorganic; that causes the putrifaction.

CHAS. DEUBLER, witness (pages 550–)

"Live right across the street from new tank, top of it is open; *of* the old one was covered. I have seen buzzards roosting on the new standpipe at different times in the day time; as many as six there at one time. It has been so within the last two weeks. You can see them there most any time in the day as many as one, roosting there, as far back as directly after it was built. It is a roosting place for buzzards; they roost awhile, then sail off, and another will come."

A. J. BALDWIN, (pages 493–4–5).

"The school here in our present condition is supplied with artesian well water; has been for five years, because the board and teachers at that time considered the water-works water as unfit for use in the school. I am a member of the board. I was at the time of the meeting and acquiesced in it; the board acquiesced in 229 it. I think it was on the recommendation of the superintendent and the complaints of the people and teachers at that time. It was verbally condemned by the concurrent action of the committee. Had to pay $5.00 a month to have water hauled to the school. Had water connected at the school with the city water, I think soon after the waterworks were put in. They have kept it there all the time until three or four years ago.

J. A. HORSLEY, supt., witness for complainant. (Pages 569–70–1–4–5)

"I reported the dead horse to the chief of police, because I knew it was wrong to let it stay there; people getting water from that stream. As soon as I discovered it was up there, I went to the chief of police at once. For eight or nine months I spent much of my time in the engine house where the water is pumped. I have spent my other time around on the streets about in different places; I go down and inspect things occasionally as superintendent. I don't stay there regularly. I don't stay at the stand pipe regularly. I stay about on the streets engaged in other business; real estate and life insurance. Don't know whose horse it was that died in the branch; understood it was a negro's. Did not know he was there before he died. (Page 135) Occasionally the people told me the water was muddy, unfit for use, smelled badly, and pressure was insufficient, for instance on these water ends, and asked me to flush mains so the water would clear, and I did it. During that time I remember complaints made several times about pressure. My recollection of first complaint, Whitehard and Green fire, '97. Have seen buzzards on tank in day.

230 F. A. RUGGLES, witness for complainant (page 79)

"I removed the timbers of the old tank when it was torn down and ordered to construct a new one. There was at that time in the bottom of said old tank, four inches in depth of foul and muddy sediment."

The city in support of this same exception refers to the affidavit of George Callaway, employé of waterworks company, filed by consent of master and counsel on both sides of the case as evidence in the case May 29th, 1902, and another of the same witness June 3, 1902, and after the examination of the other witnesses orally, proving the discovery in the water tower of the waterworks company of three dead and decaying buzzards in May 1902.

The city submits that it refrains from encumbering the record in briefing all of the testimony to the same effect as the above, inasmuch as the same was not contradicted to any extent, in any material particular; and inasmuch as the master himself has found informally but in effect, that the water was not kept in a condition suitable for the purposes intended.

231 IV. The city says that the master erred in not finding as a matter of fact that the water supplied to the citizens of Dawson from the 1st of January, '96, and up to the time of the filing of his report, was not suitable for domestic, sanitary and other useful purposes.

In support of this exception of fact, the city refers to the evidence briefed in support of exception of fact No. 3, in order to avoid repetition, with the statement that the said testimony is not contradicted to any extent in any material particular.

V. The city says that the master erred in finding that "excepting on rare occasions the reservoir was kept supplied with water sufficient to produce the required pressure and should have found as a matter of fact in his report that the water works company had not performed its contract as to pressure; that its service had not been adequate or reliable to the extent required by its contract, because these facts had been established by the testimony, and the master erred in fact in not so finding.

In support of this exception the city briefs the evidence as follows:

232 W. R. BALDWIN, (pages 337–8)

"When the cap was taken off the plug at the kiln fire water would not come out at first, but solid, soft mud. I suppose a half minute; might not have been so long before the water came commenced coming mud. I saw the mud come out and I stopped and looked at it. The hose was two or three feet from it when the mud came. By the time the hose got there I suppose one third water came and the rest mud. When it first came out it was solid, soft mud. It was coming out of the end of the hydrant. It was on Main street about 100 yards from the public square. It was on

the principal street in the city, about a block from the business center."

A. J. BALDWIN, (pages 353–4–5)

"After the three houses burned at Green and Whitchard fire, 1897, a day or two, Mr. Horsley told me they were going to make a test and I went with him. He took 100 feet of new hose furnished by him and went over there and attached it to the plug in front of Mr. Melton's, the same plug that played on these buildings of Green and Whitchard. Had two section of hose, fifty feet each, new, attached to the plug, a one inch nozzle, and the water barely went above the electric light pole. It was turned on full. It went not exceeding five feet above the pole. The pole was 25 feet high. The height of the water did not exceed thirty feet. The air was still enough to make a straight stream; ordinary condition of air; no interference with stream by wind. This was in 1897. No change had been made in the waterworks from '94 up to this time, that I know of, and none from the date of that test up to the time the new tank was built. The Green and Whitchard houses were burned up. I
233 remember the Grier and McClellan fires in '98 on Lee street. The distance from the plug to the building there was 80 feet, and the house sets inside some 25 feet. 100 feet, I would say, from the plug, excepting the width of the side walk. There was no unnecessary amount of hose. There was only one line of hose from the plug.

J. G. DEAN, (page 393)

"The old tank from the ground to the bottom of the tank was 59 feet and 8 inches. Mr. Baldwin and I measured it. For several years before it was torn down it leaked badly; never possible to fill it entirely, at least for several years before it was torn down. Might possibly by pumping all the time get it full. During these years it was not generally kept full; it leaked so badly; it was possibly kept two-thirds or about three-fourths full. The present tank is forty feet higher than the other.

Dr. W. B. CHEATHAM, (pages 415–16–17–18–19–20–21.)

During '96–97–99, I think twice, I can remember no more positively than that, I found the standpipe empty; one time in the day and the other time at night. I tried to draw some water in my bath tub, is the way I know it was empty. At another time I thought it was frozen. The weather was all right the first time; I think in the spring; not cold water. There was no water in the tank at all; could get no flow. I told Mr. Horsley and he stated to me, I think upon investigation, that this stand pipe was empty. It was empty twice, not on account of any freeze; been stopped up several times by freezes. It was twice I think Mr. Horsley admitted that the pipe was empty. The fault of the engineer or somebody; I don't know who. The last time I found it empty it was between '97 and '99. I

cannot say what year prior to that time it was. Where I live
234 the surface is lower than the surface at the stand pipe. I investigated all around and the water would not run from my faucet in my house; during '95-'6-'7-'8; the standpipe was rotten and leaked. It was leaking all along. I saw it; a considerable stream would pour out; between the whole body of it; between the staves where they came together; twenty feet from the side walk; interfered with passage. Sometimes you would have to go around on the other side of the street to get out of the spray of the water from it. It would wet the sidewalk so it was almost impassable; especially when ladies would walk around it. Horsley admitted to me that the standpipe was in a bad condition, in conversation about six months before this bill was filed. I remember the test on one occasion on College street, of the pressure, very well. Mr. Horsley, the superintendent, was present. I was there by accident; passing by to see a patient. They attached the hose, turned on the stream and threw the water twenty or twenty-five feet, or probably thirty feet high. It was some new hose they had; 100 feet. The force of the water was turned on. Mr. Horsley manipulated it. From what I could see the test was made fairly and fully. The air seemed to be perfectly still. I noticed that no currents were effecting the stream to blow it one way or the other; seemed to be what you would call still air. The water went from twenty to thirty feet. I noticed the height of it. That was on one of the principal streets of the city.

JOHN SEAY, (pages 444-5)

"I remember the McClellan fire in June '98, very well, but not the date; only one that I remember. I noticed the use of the hose
235 on that occasion; can not exactly give you the length of the hose; can give you the distance of the plug to the fire; don't think there was but three sections of the hose used; don't know what the length of the hose was; some thirty, some fifty feet to a section. It is even 100 feet from the plug to the eaves of the house. I measured that. I do not remember that there was any surplus hose used on that occasion; did not have hold of it myself; I don't think the hose was 100 feet. The water was fully turned on; there was only one line of hose from that plug. It was the size of nozzle used all the time. It was the usual nozzle. I think it was a pretty day; don't think there was any storm concealed; no storm; in my recollection it was still; the hose was about 20 feet; they got there with the hose but could not get the water on it. We threw the hose up and down trying to make the water go further; hit it on top of the house about twenty or twenty-five feet; didn't go on the roof of the house. It did go on the eaves. The water went about twenty or twenty-five feet high; not over twenty-five.

F. M. McNULTY, (pages 459, 60-1-2)

"Lived in Dawson since '81; alderman at one time; remember the McClellan fire very well but not the year. I suppose it was 100 feet from the plug to the McClellan house that was on fire. I think I turned the water on. I turned it on properly. I don't think the hose was over 100 or 150 feet. They didn't have any hose to spare. I don't think there was over 100 feet, though I won't be positive. They had an inch nozzle. The city had an inch nozzle and some three-fourths of an inch. This was the city nozzle. There was not any pressure on this occasion. Threw the water about to the eaves of the house, twelve or fifteen feet from the ground; tried to throw the water and could not; did not have pressure enough; was not force enough behind it.
236 Don't remember any disturbances in the air. This was on one of the principal streets of the city. Got an old door and held it up in front of the men holding the nozzle. Got up to the house as close as they could that way. Couldn't throw the water on top of the house. I remember the test made by Horsley and others in 1897 at Doc Melton's. I was there, Andrew Baldwin was there, and Mr. Horsley. I remember those two. Had 100 feet of hose; made a full and fair test. Mr. Horsley conducted this. When it was made with the new 100 feet of hose. The air was very calm. It was a one inch nozzle. Horsley turned the water on; threw the water in every way on that occasion; would throw water vertically, and the highest it went was 25 or 30 feet.

C. DEUBLER, (pages 505-6-509-510).

"I remember the McClellan fire. Very poor amount of pressure on that occasion; threw the water about 20 or 25 feet. The air was still at the McClellan fire, Parks fire, Green and Whitehard fire, and the dry kiln fire when I was present. I will state from my observation of the way the water was thrown and handled and manipulated on this occasion, that there was not sufficient pressure from the waterworks company to have thrown water through 100 feet of hose, one inch nozzle, in still air, vertically, fifty feet. There was not pressure enough. (The master allowed this testimony over objection after the witness stated his experience with water and fires.) I remember the old tower; lived 75 or 100 yards right across the street in 1895-6-7-8, until it was replaced; it was in a leaky condition. After filling it about half full, further up it leaked; like filling a basket. It leaked all around; shot out in big streams, in some places as big as my hand. Had large streams and small ones all around the staves, running up and down. When the wind
237 was blowing, the water would reach my porch. Don't think the tank had been filled in several years (p. 511). It could not be.

J. P. ALLEN (pages 534 to 538)

"Acting in capacity of engineer for the waterworks company at the station. Water muddy, right smart. It was deficient in quantity; was not enough of it for filling the tank; that was true right smart; had to run the pump slow; been times in which you could not get enough to fill it at all during dry weather. The standpipe in town was very leaky. I would get it full before I would quit; has taken as long as six hours. My instructions were to keep it full in case of fire. I was required to keep it full. It would be hard to do sometimes. Have to keep the pumps going day and night, and then it would not get full, the tank leaked so bad. Sometimes the water was very muddy and sandy when it was dry, on account of the suction. The water was low down and it would suck sand. The sand would finally clog in the well, and would have to pump sand; would cut out the plungers and valves. Water was very draggy when it was low. I did not drink the water. It was not fit to drink. I thought it was unclean. In opening the pumps I noticed an inch of corrosion and mud clean to the well part of the pump. There was a kind of offensive odor like you will find in muddy streams. I thought the inlet pipe should have been cleaned out. I don't know if I did not mention it to Mr. Horsley that there should be made a hole to keep the same out. Would be sucked up through the pump. The pump is what kept that from filling up, I suppose; never was cleaned, to my knowledge. I was employed as engineer for thirty days by Mr. Horsley.

(P. 541)

Cross-examination:

238 Q. It was filled all the time you ran the pumps during that exceptionally dry spell? Just took longer to fill it?

A. I don't think they had sufficient water to fill it; kept running the pumps.

E. J. CAMERON, (pages 551).

"Age 29. Am chief fire department Dawson, have had experience 12 years; from bottom to head of this department; since November '99 (p. 554). Since present tower have noticed the absence of pressure once that I know of. For twenty minutes, I suppose. I know there was no water in the tower; no water came up here in the engine from spigot. It was six or seven months ago. I immediately notified Mr. Baldwin and Mr. Deubler; thought there might be a burst in the main, or something to cause the leak, or the tank run dry, without their knowing about it. One Saturday morning I started to washing the wagon and the boy complained there was no water coming out of the faucet. I went and tried the faucet and there was none. Went and tried it again in about twenty minutes and the water was coming in full pressure. I don't know, sir, how long it had been empty.

HORSLEY, supt. W. Co. (p. 130)

"During the summer of 1900, maybe 1899 and 1900, during the very dry season, the pressure went down three or four times, so low there was no pressure. Several times early in the morning it would not run out of the hydrant. It was this way, I suppose, two or three times.

239 VI. The master erred in his 9th finding of fact as follows:

"No complaint concerning the character of the service or the amount of the pressure was made to the water Co. until after the institution of the present suit." The city says the contrary was proved by witness for the complainant Horsley. (See latter part of his testimony as briefed under exception of fact No. 3, page 44 of these exceptions.

VII. The master erred in his third finding of fact, that the city had express notice that the bonds were to be issued and sold for the purpose of procuring the money with which to construct the waterworks plant, and that the city acquiesced in this arrangement. Because the evidence showed that this notice was not received until after the contract was made and much of the work done by the waterworks company towards construction, and an extension of time was desired and requested.

VIII. The master erred in his fourth finding of fact in not finding that prior to the date of the assignment of the cause of action of the complainant, that the waterworks company only had demanded payment of water rentals and had entire control over the contract.

Because the city says that while such otherwise was proven to be the fact, James H. Dawes, superintendent of the water works company, a witness for the complainant also testified (see page 115) "The Dawson Water Works Company had charge of the original litigation and all these demands against the city of Dawson up to the finding of the supreme court of Georgia already referred to."

240 IX. The master erred in his fifteenth finding, because such finding was entirely irrelevant.

X. The master erred in finding in fact for the company the right to recover the water rentals and all other relief. Because the evidence not only failed to show that the water works company performed the contract as per pressure or kind of water or otherwise, but the uncontradicted testimony showed quite the contrary.

May 23d, 1903.

GUERRY & HALL,
J. A. LAING,
M. C. EDWARDS,
Att'ys for the City.

Filing: Filed in clerk's office 25 May, 1903,
O. C. FULLER, *Clerk*,
By N. A. BROWN, *Deputy*

241 *Compensation of Special Master.*

In the Fifth Circuit Court of the United States for the Western Division of the Northern District of Georgia.

COLUMBIA AVENUE SAVING FUND, SAFE DEPOSIT, Title and Trust Company *vs.* THE CITY OF DAWSON ET AL.	In Equity. No. 44. Bill.

Ordered, that the compensation of W. A. Wimbish, for his services as master in the above entitled cause, be and the same is hereby fixed at two thousand dollars.

It is further ordered that said compensation be paid in equal proportions by the plaintiff and by the defendant, City of Dawson; that is to say, one thousand dollars to be paid by Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, and one thousand dollars by the City of Dawson.

The court reserves the right on final decree to tax the amount so allowed the master as costs against either party or in such proportion between them as to the court shall seem just and equitable.

This July 4th, 1903.

DON A. PARDEE,
Circuit Judge.

Filing: Filed in clerk's office July 4, 1903.

O. C. FULLER, *Clerk.*

242 *Final Decree.*

In the Fifth Circuit Court of the United States for the Western Division of the Northern District of Georgia.

COLUMBIA AVENUE SAVING FUND, SAFE DEPOSIT, Title and Trust Company, Complainants, *vs.* THE CITY OF DAWSON, DAWSON WATERWORKS Company, W. B. Cheatham, as Mayor; J. G. Dean, J. S. Lowrey, Chas. Deubler, F. M. Jennings, F. Nasworthy, F. M. McNulty, as Aldermen; John Seay, as City Marshal, and A. J. Baidwin, Defendants.	In Equity. No. 44.

This case same on to be heard upon the report of W. A. Wimbish, master in chancery, filed herein on April 27th, 1903, and upon the exceptions filed by the defendant, The City of Dawson, to the report of said master, and upon the motion of complainant to confirm said

report and for final decree, and same was argued by counsel for complainant and defendants, respectively, and the said exceptions to said report were duly heard and considered.

Whereupon, upon consideration thereof, it is ordered, adjudged and decreed by the court:

First. That the exceptions to said report be, and the same are, all and severally overruled.

Second. Whereupon, it is ordered, adjudged, considered and decreed that said report of said master in chancery, W. A. Wimbish, Esquire, be, and the same is, in all respects confirmed, and it is ordered that a decree in favor of the said complainant against the defendants, in accordance with the findings made by said master in said report, be made and entered herein.

Third. In accordance with the findings made by the said master in said report, it is ordered, adjudged and decreed by the
243 court that the contract entered into between the City of Dawson and the Dawson Water Works Company, which constitutes the subject matter of his suit, and a copy of which is annexed to the complainant's bill of complaint, marked Exhibit "B," and by reference made a part of said bill of complaint, is, and it is hereby declared and decreed to be valid, binding and enforceable, and that the ordinances, action and conduct of the City of Dawson, the mayor and council and other officers of said city, whereby it is sought to invalidate the said contract, are unconstitutional and void as seeking to impair the obligation of said contract.

And it is further ordered, adjudged and decreed that a perpetual injunction be granted to complainant prohibiting, restraining and forbidding the City of Dawson, the mayor and aldermen of the said City of Dawson, and the other officers and agents, and their confederates and abettors, from negotiating, selling or disposing of any of the bonds of the City of Dawson mentioned in complainant's said bill of complaint, authorized by the said City of Dawson to be used in the construction of a system of waterworks by the said City of Dawson, and from constructing, maintaining or operating any system of water works in the city of Dawson for the purpose of supplying either the said city of Dawson or its inhabitants with water for fire protection or domestic use, or from entering into any contract or arrangement with any person, firm, or corporation for the construction, lease, operation, or use of any system of water works, or any supply of water for fire protection or other municipal purpose; or from laying mains or pipes, or permitting the laying of pipes or mains for the construction of water works; or from paying out any moneys for water works, or from incurring any obligation for water works,
244 or from entering into or carrying out any contract for water works, save and except the contract referred to in complainant's bill of complaint; or from forbidding or preventing any person, organization, fire company, or agency from carrying out said contract with the Dawson Water Works Company; or from placing any obstable in the way of the due carrying out of the provisions

and specifications thereof according to its terms, for and during the term of the aforesaid contract and while said contract shall remain in force.

Fourth. And it is further ordered, adjudged and decreed by the court that the said complainant do recover of the said City of Dawson, and that the said City of Dawson do pay to the said complainant the sum of the water rentals due and unpaid from January 1st, 1896, with interest on each installment thereof as the same matured, at the rate of seven per cent. per annum after maturity. That is to say that the said complainant do have and recover of the said City of Dawson the sum of sixteen thousand dollars, principal debt, together with interest thereon at the rate of seven per cent. per annum, as follows:

One thousand dollars from January 1st, 1896,
One thousand dollars from July 1st, 1896,
One thousand dollars from January 1st, 1897,
One thousand dollars from July 1st, 1897,
One thousand dollars from January 1st, 1898,
One thousand dollars from July 1st, 1898,
One thousand dollars from January 1st, 1899,
One thousand dollars from July 1st, 1899,
One thousand dollars from January 1st, 1900,
One thousand dollars from July 1st, 1900,
One thousand dollars from January 1st, 1901,
One thousand dollars from July 1st, 1901,
245 One thousand dollars from January 1st, 1902,
One thousand dollars from July 1st, 1902,
One thousand dollars from January 1st, 1903,
One thousand dollars from July 1st, 1903,

together with future installments as the same accrue, to-wit: one thousand dollars on the first days of January and July in each year hereafter during the continuance of said contract, that is to say, during the term of twenty years that said contract remains of force. And it is ordered, adjudged and decreed by the court that a writ of *fieri facias* issue in favor of the complainant against the said defendant for the collection of said rentals, and that such writs may be hereafter applied for as may be necessary to fully carry this decree into effect.

And it is further ordered, adjudged and decreed by the court that an accounting be had before W. A. Wimbish, Esq., special master, between the said Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, trustee, and the said Dawson Water Works Company and the said City of Dawson, in order that it may be ascertained what, if anything, is due by the said City of Dawson for water furnished by the said Dawson Water Works Company under the agreement made in commutation of city taxes, and that the value of the water so supplied be allowed as a credit against the demand of the said City of Dawson for the amount due by the said

Dawson Water Works Company as *ad valorem* taxes on its property; and until said accounting shall be had and the said City of Dawson shall credit on the proper tax bills the amount due and unpaid by it on account of water rentals, the temporary injunction heretofore granted against the said City of Dawson from proceeding
246 with the collection of tax executions issued by it, be continued in force.

And it is further ordered, adjudged and decreed by the court, that the City of Dawson and the Dawson Water Works Company, and each of them, be decreed, directed and required to specifically perform the aforesaid contract forming the subject of this suit, and to severally comply with their respective obligations arising and to arise thereunder, and to this end that an injunction issue requiring such specific performance.

And it is further ordered, adjudged and decreed that complainant do recover of said defendant, The City of Dawson, the cost of this proceeding, to be taxed by the clerk, including the compensation of the special master heretofore allowed, for which execution as at law may issue.

Notice having been given of an appeal in this case a stay of sixty days from date is allowed.

This the third day of August, A. D. 1903.

In open court.

DON A. PARDEE,
Circuit Judge.

Filing: Filed in clerk's office 3 August, 1903.

O. C. FULLER, *Clerk*,
By N. A. BROWN, *Deputy.*

247 *Petition for Appeal to the Supreme Court of the United States.*

In the Circuit Court of the United States for the Western Division of the Northern District of Georgia.

THE COLUMBIA AVENUE SAVING FUND, SAFE DEPOSIT, TITLE & Trust Company
vs.
THE CITY OF DAWSON, W. B. CHEATHAM, J. G. DEAN, J. S. Lowrey, Charles Deubler, F. M. Jennings, F. Nasworthy, F. M. McNulty, A. J. Baldwin, John Seay, and The Dawson Water Works Company.

Petition for appeal; bill for injunction, etc.

Interlocutory and final decree for the plaintiff.

Supreme Court of the United States:

The City of Dawson, conceiving itself aggrieved by the grant of the injunction by interlocutory decree and by the decree overruling

its demurrer and by the final decree against it, in the above entitled cause, does hereby appeal from each and all of said decrees to the Supreme Court of the United States, for the reason specified in the assignment of errors which is filed herewith. And prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said decrees were made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 10 day of Oct. 1903.

DU PONT GUERRY,
Sol. for City of Dawson.

Order: The foregoing claim of appeal is allowed.
Oct. 10th, 1903.

DON A. PARDEE,
Circuit Judge.

Filing: Filed in clerk's office 10 day of Oct., 1903,
O. C. FULLER, *Clerk.*

248 *Notice to Dawson Water Works Co. of Appeal.*

In the Fifth Circuit Court of the United States for the Western Division of the Northern District of Georgia.

COLUMBIA AVENUE SAVING FUND, SAFE DEPOSIT, Title & Trust Co., Complainants, *versus* THE CITY OF DAWSON, DAWSON WATERWORKS COMPANY, W. B. Cheatham, as Mayor; J. G. Dean, J. S. Lowrey, Chas. Deubler, F. M. Jennings, F. Nasworthy, F. M. McNulty, as Aldermen; John Seay, as City Marshal, and A. J. Baldwin.	In Equity.

To The Dawson Waterworks Co. and the other co-defendants:

Take notice that on the 10th inst., the City of Dawson will make application for an appeal from the decree in the above stated case in said court, to the Supreme Court of the United States; and that you are hereby invited to join in the same.

This October 3, 1903.

DU PONT GUERRY,
Counsel for the City of Dawson.

Service.

GEORGIA, }
Terrell County. }

I have this day served W. A. Jeter, the superintendent of the Dawson Waterworks Company in Dawson, he being the highest

official in charge of the business, and being the only representative of said Co. known to me in said State of Ga.

J. H. SLADE,
Dept. Sheriff.

GEORGIA, }
Terrell County. }

Personally appeared before me, an officer authorized by the laws of the State of Georgia to administer an oath, J. R. Mercer,
249 who being duly sworn, says: That he is the mayor of the city of Dawson, Ga., that he mailed to the president of the Dawson Waterworks Co. at Philadelphia, Penn., who is a non-resident of the State of Georgia, a copy of the within notice of application for appeal.

This Oct. 6, 1903.

J. R. MERCER.

Witness:
L. C. HILL, *N. P.* [SEAL OF N. P.]

GEORGIA, }
Terrell Co. }

In person appeared before me J. H. Slade who on oath deposes and says that on the 5th inst. he served W. A. Jeter, superintendent of the Dawson Waterworks Co. in Dawson, Ga., and who is the official in charge of said works, the highest official of said company in this State, with a copy of the notice to which this affidavit is attached.

J. H. SLADE.

Sworn to and subscribed before me this 8th day of Oct. 1903.
L. C. HILL, *N. P.* [SEAL N. P.]

Notice is accepted, but we decline to join in the appeal.

W. B. CHEATHAM, *As Mayor.*
A. J. BALDWIN,
F. M. JENNINGS,
J. S. LOWREY,
F. NASWORTHY,
CHAS. DEUBLER,
F. M. McNULTY, *As Aldermen.*
JOHN SEAY, *As City Marshal.*

Filing: Filed in clerk's office 10 day of Oct. 1903.

O. C. FULLER, *Clerk.*

250 *Citation to Appellee.*

In the Circuit Court of the United States for the Western Division of the Northern District of Georgia.

THE COLUMBIA AVENUE SAVING FUND, SAFE DEPOSIT, TITLE and Trust Company
vs.
THE CITY OF DAWSON, W. B. CHEATHAM, J. G. DEAN, J. S. Lowrey, Charles Deubler, F. M. Jennings, F. Nasworthy, F. M. McNulty, A. J. Baldwin, John Seay, and The Dawson Waterworks Company.

Petition for appeal; bill for injunction, etc.

Interlocutory and final decree for the plaintiff.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at the city of Washington within 30 days from the date of this writ, pursuant to an appeal duly allowed by the circuit court for the western division of the northern district of Georgia, and filed in the clerk's office of said court on the 10th day of Oct. 1903, in the cause wherein The City of Dawson is appellant and you are appellee, to show cause, if any, why the decree rendered against the said appellant as in said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10 day of Oct. 1903.

DON A. PARDEE,
Circuit Judge.

251 Service of a copy of the within citation is hereby admitted. This 10 day of Oct. 1903.

J. G. PARKS,
JOHN I. HALL,
OLIN J. WIMBERLY,
Solicitors for the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company.

Filing: Filed in clerk's office 10 day of Oct. 1903.

O. C. FULLER, *Clerk.*

252 *Bond for Supersedeas.*

In the Circuit Court of the United States for the Western Division of the Northern District of Georgia.

THE COLUMBIA AVENUE SAVINGS FUND, Safe Deposit, Title & Trust Company *vs.* THE CITY OF DAWSON, W. B. CHEATHAM, J. G. Dean, J. S. Lowrey, Charles Deubler, F. M. Jennings, F. Nasworthy, F. M. McNulty, A. J. Baldwin, John Seay, and The Dawson Waterworks Company.	Petition for Appeal, Bill for Injunction, &c., Interlocutory and Final Decree, for the Plaintiff.

Know all men by these presents, that the City of Dawson as principal, and A. J. Carver, A. J. Baldwin, A. M. Raines and J. R. Mercer, as sureties, are held and firmly bound unto The Columbia Avenue Savings Fund, Safe Deposit, Title & Trust Company, complainant, in the full and just sum of $40,000.00, to be paid to said company, its certain attorneys, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seal and dated this 10 day of Oct. 1903.

Whereas, lately at a circuit court for the 5th circuit of the United States for the western division of the northern district of Georgia, in a suit depending in said court between the Columbia Avenue, Savings Fund, Safe Deposit, Title & Trust Company, and the City of Dawson, Dawson Waterworks Company, W. B. Cheatham as mayor, J. G. Dean, J. S. Lowrey, Charles Deubler, F. M. Jennings, F. Nasworthy, F. M. McNulty, as aldermen, John Seay as city marshal and A. J. Baldwin, certain decrees were rendered against the said City of Dawson, and, the said City of Dawson having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the
253 said decrees in the aforesaid suit, and a citation directed to the said Columbia Avenue Savings Fund, Safe Deposit, Title & Trust Company, citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, within 30 days from the date hereof.

Now the condition of the above obligation is such that if the said City of Dawson shall prosecute its appeal to effect and answer all

damages and costs if it shall fail to make its appeal good, then the above obligation to be void, else to remain in full force and virtue.

CITY OF DAWSON,
By J. R. MERCER, *Mayor.*
A. J. CARVER.
A. J. BALDWIN.
A. M. RAINES.
J. R. MERCER.

Sealed and delivered in the presence of

O. C. FULLER,
Clerk U. S. Circuit Court, Nor. Dist. Ga.,

who certifies that the sureties are solvent and worth the penal sum of the bond.

Approved by

DON A. PARDEE,
Circuit Judge.

UNITED STATES OF AMERICA, }
Northern District of Georgia. }

In person appeared before me A. J. Carver, A. J. Baldwin, A. M. Raines & J. R. Mercer, sureties on foregoing bond, who being duly sworn, each for himself, says that he is worth the sum of
254 twenty thousand ($20,000) dollars, in his own right over and above his just debts and liabilities, and exemptions under the homestead and exemption laws of Georgia: that his property consists of real estate, which he owns in his own right, free from incumbrance, in the State of Georgia; and for the purpose of meeting any liability which may be adjudged against him as surety on foregoing bond, he hereby waives for himself and family all homestead and exemption rights under the constitution and laws of the State of Georgia, to the property above described, and to all his other property.

A. J. CARVER.
A. J. BALDWIN.
A. M. RAINES.
J. R. MERCER.

Sworn to and subscribed before me, this 13th day of Oct. 1903.

O. C. FULLER,
Clerk U. S. Circuit Court.

Filed in clerk's office 10 day of Oct. 1903,

O. C. FULLER, *Clerk.*

255 *Assignment of Errors.*

In the Circuit Court of the United States for the Western Division of the Northern District of Georgia.

THE COLUMBIA AVENUE SAVING FUND, SAFE DEPOSIT, TITLE & Trust Company
vs.
THE CITY OF DAWSON, W. B. CHEATHAM, J. G. DEAN, J. S. LOWRY, Charles Deubler, F. M. Jennings, F. Nasworthy, F. M. McNulty, A. J. Baldwin, John Seay, and The Dawson Waterworks Company.

Petition for appeal, bill for injunction, etc.

Interlocutory and final decree for the plaintiff.

And now comes the City of Dawson, and files with the clerk of said circuit court, with its petition for appeal in the above stated cause the following assignment of errors:

First. The court erred in signing and entering said interlocutory decree, because according to the averments of said bill as amended there was no equity therein.

Second. The court erred in signing and entering said decree, because according to the averments of said bill as amended there was no right of action in complainant for the purposes and prayers thereof, the right of action according to said averments being a common law right and being enforceable by a common law action only.

Third. The court erred in signing and entering said decree, because according to the averments in said bill as amended the alleged contract sued on in said bill and declared to have been made in said State by and between the City of Dawson and the Dawson Waterworks Company, both being corporations of said State, was
256 void under the constitution and laws thereof.

Fourth. The court erred in signing and entering said decree, because according to the averments of said bill as amended and the answers of appellants as undisputed, the alleged contract sued on in said bill and declared to have been made in said State by and between the said City of Dawson and the said Dawson Waterworks Company, both being corporations of said State, was void under the constitution and laws thereof.

Fifth. The court erred in signing and entering said decree, because these appellants set forth in their answer as cause why said injunction should not be granted as prayed, and duly proved by a duly certified record from the supreme court of the State of Georgia, that prior to the filing of said bill, and namely on the fourteenth day of March, 1899, the supreme court of Georgia in the cause of

the said The Dawson Waterworks Company *vs.* The said The City of Dawson in a suit brought by said plaintiff against the said defendant in the superior court of Terrell county, Georgia, for alleged rentals under said alleged contract for the year 1895, and which said cause was carried to said supreme court by writ of error on the part of the said The City of Dawson, decided and adjudged that under the constitution and laws of said State and its settled policy said alleged contract sued on in said bill was void for want of power on the part of said city to make the same, and that complete performance of such contract by said plaintiff did not estop the said The City of Dawson from pleading such want of power or the illegality of said contract, these appellants then and now contending that by said judgment and the proof thereof that the complainant was and is estopped and concluded by said judgment of said
257 supreme court as well as the said The Dawson Waterworks Company.

Sixth. The court erred in signing and entering said decree "that a writ of injunction do issue directed to said City of Dawson, its mayor and aldermen, their officers, agents, confederates, ab*b*ettors, restraining them or either of them from erecting or installing any system of waterworks for the city of Dawson or other water supply for fire protection or furnishing the citizens or inhabitants of said city for domestic, sanitary or other purposes, or from entering into any contract or arrangement with any person, firm or corporation for the construction, lease, operation, or use of any system of waterworks, or the supply of water for fire protection or other municipal purposes, or from laying mains or other waterworks, or permitting the laying of pipes or mains for the construction of waterworks in violation of the contract set out in complainant's bill or the exclusive right thereby given, or from selling or otherwise disposing of bonds, and in particular from selling or offering for sale or disposing of any of the bonds of the city of Dawson mentioned in complainant's bill; or from paying out any moneys for waterworks; or from incurring any obligation for waterworks; or from entering upon or carrying out any contract for waterworks save and except the contract referred to in complainant's bill; or forbidding or preventing any person, organization, fire company, or agency, from carrying out the aforesaid contract with the Dawson Waterworks Company, or from placing any obligation in the way of the due carrying out and performance and fulfillment thereof according to its terms; or from ordering, directing, ordaining, or by corporate act or ordinance or otherwise causing, advising, counselling or procuring the fire depart-
258 ment, fire companies, or other fire organizations or individuals acting as the fire department or company or using the city's fire apparatus to desist or refrain from the use of water furnished by the Dawson Waterworks Company," because such order or decree could be lawfully granted or such injunction lawfully issued only on the ground that under such alleged contract the Dawson Waterworks Company had, from said municipal corporation, an ex-

clusive franchise to construct, maintain, own and operate waterworks in said city for supplying the inhabitants thereof and said municipal corporation had no power under its charter or under the law to grant such exclusive franchise, and such grant was contrary to the constitution of the State of Georgia and absolutely void.

Seventh. The court erred in entering said decree directing an injunction to issue against "said city, its officers and agents from levying or enforcing the collection of any city tax or license fee against the waterworks of the Dawson Waterworks Company, stipulated to be paid in water, or by the furnishing of water as set forth in the contract, in violation of said contract with said waterworks company; or doing any other act in violation of the covenant, stipulation, terms and conditions of said contract;" because the alleged contract between said city and said Dawson Waterworks Company for the remission of license fees, taxes, dues and claims in consideration of water to be furnished to the public municipal buildings and two public fountains, was contrary to the constitution and laws of said State and therefore void.

Eighth. The court erred in sustaining said equitable jurisdiction in said cause and in granting said decree for injunction, because according to the averments of said bill as amended, the only
259 right of complainant was the recovery of water rents upon proof in a proceeding at law that such water rents were due and owing to the complainant by the City of Dawson.

Ninth. The court erred in sustaining equitable jurisdiction in said cause and in granting said decree for injunction because according to the averments of said bill as amended no contract or facts were set forth therein to sustain such equitable jurisdiction for a decree for injunction, specific performance or other relief.

Tenth. The court erred in granting said decree for said injunction against said City of Dawson and others, because the evidence introduced by these appellants at the hearing of the application for said injunction clearly showed, notwithstanding the evidence of the complainant to the contrary, that the Dawson Waterworks Company failed during the years for which the water rents were claimed, namely, 1896, 1897, 1898 and 1899, to date of the filing of said bill, to perform its part of said alleged contract, so as to entitle said Dawson Waterworks Company or said complainant to receive said water rents or any of them.

Eleventh. The court erred in granting said decree for said injunction, because the alleged performance of said alleged contract for water rents on the part of said Dawson Waterworks Company was denied in sworn answers of these appellants for cause at said hearing and the evidence of the complainant failed to show such performance.

Twelfth. The court erred in granting said decree for said injunction against the said City of Dawson and others because the proof at said hearing showed that the inhabitants of said city were
260 greatly in need of a supply of pure water for fire protection and domestic purposes; that it was the right and duty of

said municipal corporation to secure and furnish said supply, and that the said Dawson Water Works Company was not furnishing it, and was not with its existing system able to furnish it, and had not furnished and had not been able to furnish it for and during all of said years and was growing less able all the time.

Thirteenth. The court erred in granting said decree for said injunction because under the averments of said bill as amended the court had no jurisdiction of the cause, it appearing that The Dawson Waterworks Company should have been party plaintiff, if any lawful party at all, and not defendant; was a corporation created by the State of Georgia having its only existence and domicile therein, and in said district, all of these defendants being likewise resident in said State and district.

Fourteenth. The court erred in granting said decree for said injunction for want of jurisdiction of said cause, because there was according to the averments of said bill as amended no diversity of citizenship and no question giving jurisdiction to said court.

Fifteenth. The court erred in granting said decree for said injunction because it appeared from the answer of appellants and the undisputed proof in support of the same, that prior to the filing of said bill and in a suit between The Dawson Waterworks Company and The City of Dawson, in which the former was plaintiff and the latter defendant, the supreme court of Georgia had in its judgment rendered on the 14th of March, 1899, determined the law of this alleged contract sued on in said bill, as between
261 the said original parties thereto, and declared said alleged contract to be void, appellant contending that the said complainant is concluded by said judgment as original party to the contract, alternative payee and as subsequent payee under the allegations in said bill showing the action of the Dawson Waterworks Company in transferring the right to collect and sue for said water rents, after the said judgment of said supreme court had been rendered.

Sixteenth. The court erred in granting said decree because the averments in said bill as amended showed that complainant was an assignee of the water rent claims sued on, and therefore had no right to bring said suit thereon in said court.

Seventeenth. The court erred in not denying the injunction under the pleadings and proof in said cause.

Eighteenth. The court erred in not dismissing the bill for want of equitable jurisdiction.

Nineteenth. The court erred in not dismissing said bill as prayed by these appellants for want of jurisdiction of said cause.

Twentieth. The court erred in overruling and in not sustaining the demurrer filed by the defendants in so far as the City of Dawson was concerned and in overruling and in not sustaining said demurrer as to all of the defendants.

Twenty-first. The court erred in overruling and in not sustaining the demurrer filed by the defendants in so far as the City of Dawson

was concerned, and in overruling and in not sustaining said demurrer as to all of the defendants, because defendant says the said demurrer ought not to have been overruled, but should have
262 been sustained on each and all of the grounds thereof:

(1.) Because the want of jurisdiction appeared.

(2.) Because jurisdiction did not appear.

(3.) Because under the law and alleged facts the Dawson Waterworks Company could be a complainant only.

(4.) Because under the bill as amended there was no Federal question or other ground of jurisdiction.

(5.) Because under the facts alleged the complainant was entitled to none of the relief prayed.

(6.) Because complainant had an adequate and complete remedy at law.

Twenty-second. The court erred in entering the final decree in said cause against the defendants, of file August 3rd, 1903.

Twenty-third. The court erred in its final decree of file August 3rd, 1903, in overruling all and severally the exceptions filed by the City of Dawson to the report of W. A. Wimbish, master in chancery, filed April 27th, 1903.

Twenty-fourth. The court erred in said final decree in confirming said report in all respects, and in ordering a decree in favor of said complainants against the defendants in accordance with the findings made by the master in said report.

Twenty-fifth. The court erred in said final decree in adjudging that the contract entered into between the City of Dawson and the Dawson Waterworks Company, which constitutes the subject matter of this suit, to be valid, binding and enforcible, and that the ordinance, action and conduct of the City of Dawson, the mayor and council and other officers of said city whereby it is sought to
263 invalidate the said contract, are unconstitutional and void, and seeking to impair the obligation of said contract; because this defendant says that under the pleadings, evidence and law the obligation of the contract alleged and adjudged to be impaired did not exist, namely, the alleged grant of an exclusive franchise by the city to the Dawson Waterworks Company.

Twenty-sixth. The court erred in said decree in adjudging that a perpetual injunction be granted complainant prohibiting the City of Dawson, the mayor and aldermen of said city, and other officers and agents, from negotiating, selling or disposing of any of the bonds of the city of Dawson mentioned in complainant's bill to be used in construction of the system of waterworks by the said city of Dawson, and from constructing, maintaining or operating any system of waterworks in the city of Dawson for the purpose of supplying either the said city of Dawson or inhabitants with water for fire protection or domestic use, or from entering into any contract or arrangement with any person, firm or corporation for the construction, lease, operation or use of any system of waterworks, or any supply of water for fire protection or other municipal purposes,

or from laying mains or pipes, or permitting the laying of pipes or mains for the construction of waterworks, or from paying out any moneys for waterworks, or from incurring any obligation for waterworks, or from entering into or carrying out any contract for waterworks save and except the contract referred to in complainant's bill of complaint, or from forbidding or preventing any person, organization fire company or agency from carrying out said contract with the Dawson Waterworks Company; or from placing any obstacle in the way of the due carrying out of the provisions and specifications thereof according to its terms for and during the term
264 of the aforesaid contract, and while said contract shall remain of force. Because this defendant says that under the law the City of Dawson not only had the right, but that if there were occasion therefor it was the duty of said city to do the very things which it by said decree is enjoined from doing.

Twenty-seventh. The court erred in said decree in adjudging that the complainant recover of the City of Dawson the sum of the water rentals unpaid from January 1st, 1896 with interest on each installment thereof as the same matured at the rate of 7% per annum after maturity, that is to say the sum of $16,000.00 principal debt with interest as installments, and interest thereon due up to and including the 1st of July, 1903. Because the defendant says it did not appear from the proof or otherwise that said installments and interest had been earned by the waterworks company under its alleged contract, or otherwise, or that the same was due by the city to said company or complainant.

Twenty-eighth. The court erred in its said decree in adjudging that the complainant recover of this defendant $1000.00 on the first days of January and July in each year hereafter during continuance of said contract, that is to say, during the term of twenty years that said contract remains of force. Because this defendant says that the right of recovery as to said sums depends upon the performance upon the part of the waterworks company of its alleged contract with the City of Dawson, and it is wholly illegal to decree recovery in advance of performance and before said sums could possibly be due even in the event of performance.

Twenty-ninth. The court erred in said decree in ordering that a writ of *fieri facias* issue against the defendant in favor of the
265 plaintiff for the collection of said rentals, and that such writs may be hereafter applied for as may be necessary *as* to fully carry this decree into effect, because this defendant says that the decree upon which said writs are ordered to be issued is itself illegal in adjudging recovery on behalf of said complainant against this defendant.

Thirtieth. The court erred in said decree in adjudging the City of Dawson, and the Dawson Waterworks Company, and each of them be required to specifically perform the aforesaid contract, and to severally comply with their respective obligations arising and to arise thereunder, and that to such end an injunction requiring spe-

cific performance, because this defendant says that the remedy of specific performance as thus applied is unauthorized by the terms of said contract, and the law applicable thereto.

Thirty-first. The court erred in said decree in adjudging the specific performance of said contract on the part of the city, and of the said waterworks company, because there is no complaint or allegation of want of performance on the part of the waterworks company in the past, or of any threatened non-performance on its part as to the future, in complainant's bill.

Thirty-second. The court erred in said final decree in taxing this defendant with the entire compensation of the special master, namely, the sum of $2000.00, and all the cost, because this defendant says that the same is unjust and an abuse of discretion on the part of the court as no reason appears why the city of Dawson should bear the entire burden of the expenses of the litigation.

266 Thirty-third. The court erred in allowing the sum of $2000.00 as compensation to the master because this defendant says that the same in amount is grossly excessive for the services performed.

Thirty-fourth. The court erred in said decree in overruling the first exception of law of this defendant, which was as follows:

The city submits that as certified by the master it offered certain oral evidence (as appears from the report of the evidence made by the reporter, pages 356, *et seq.*) during the examination of the witnesses in the cause before the master, and which the master then and there rejected, and which evidence so offered and the rulings thereon as now certified by the master, were and are as follows:

By Mr. GUERRY:

Q. State what you saw with reference to that.

Here the question was terminated by an objection, and Mr. Guerry said to the master, "We propose to show that they undertook to wet that building so as to prevent it from catching fire, and that the roof was about twenty feet high, and that the stream did not have force enough to go on to the building so as to wet it. We would ask your honor to rule on that."

The master thereupon responded: "Mr. Guerry, any of these fires that you have reason to believe that you can show the conditions were such as are required in the test, of course the testimony would be admissible, but I have ruled several times that testimony will not be admitted unless you can bring it within the conditions already stated."

Mr. Guerry responded: "Understand I am doing this for the purpose of getting the full benefit of the exceptions. Not contesting your honor's ruling, I want to get the full benefit of it. I don't

267 want it to appear in the record that I had one or two little instances of this sort."

The MASTER: "You can save time by stating what you expect to prove and let it go in the record."

Mr. GUERRY: "Very well, sir. I expect to prove certain things by certain witnesses."

The MASTER: "Very well, I will take a few minutes' recess in order that you may state to the stenographer what you expect to prove; and I will have it read to me and then make a ruling."

At the termination of the recess Mr. Guerry said: "With the permission of the court we propose to prove by this witness (A. J. Baldwin), and certain other witnesses, the following, and we now make these propositions at the suggestion of the court and in order to save time, so that the court can rule upon them altogether.

We desire not to propose all of our proof, but enough of the same to indicate its character and its extent, on the question involved in the proposed proof:

By A. J. BALDWIN, the witness now on the stand, the following: "That at the fires that destroyed the residences of F. L. Parks, one in the year 1898 and one in the year 1899, the hose was attached to the plugs of the Dawson Water Works Company, not over 400 feet away, on one of the principal streets of the city; and the force from the same was not sufficient to do anything towards extinguishing the said fires; and the building in each instance was burned down; that the force of pressure from said hydrants was so weak that those trying to throw the water on the fire could not get near enough to throw the streams on the fire, although they did stand within 40 or 50 feet of the building.

That witness witnessed the fire that destroyed the Dawson
268 oil mill, in Dawson, on the 4th day of January, 1899. The mill was in full operation and supplied with 200 feet of standard hose, same kind and size of nozzle as the city's hose. This hose was immediately attached to the Dawson Waterworks Company's hydrant, 15 feet from the corner of said mill by the hands and turned on said fire. The pressure of said water was so weak it was entirely insufficient to prevent the burning of said building although attached and put to work very promptly; and in consequence *on* said weak pressure thus used, those using the hose were unable to stay near enough to the fire to throw water on it. That the pressure at the time was not sufficient to throw the water over 30 feet high with a one inch nozzle attached to the hose. The mill was on one of the principal streets of the city and one of the lowest points, being ten feet lower than the base of the standpipe on the waterworks company.

Witness saw the fire which destroyed the Farnum house, April 1898, being near his place of business. Fire caught in kitchen, low one-story building near his place of business, not more than fifteen or twenty feet high; and the stream of water from the waterworks did not and could not reach more than 25 feet high on that occasion. Don't know whether the nozzle was ¾ or one inch; but it

was one or the other. On this occasion witness was hit by the stream of water with its full pressure in the face while standing within eight feet of the nozzle and suffered no inconvenience from it, except slight strangulation. At the time this happened the nozzle was not more than 50 feet from the plug. Witness cannot state the length of the hose. Witness could not state positively what the length of the hose was. It was probably 150 feet. Eight buildings were destroyed on this occasion; and the fire was never checked until
269 the people were able to get the steam fire engine belonging to said city at work, when the flames were subdued by said engine. That from his own experience with fires, he knows that a pressure equal to that agreed to be furnished by the Dawson Waterworks Company viz: 50 feet vertically in still air, this fire could have been extinguished with the apparatus then in hand and with the hose being used, with slight damage to the hotel and kitchen.

Witness was at the fire that destroyed the J. R. Smith residence, May 1st, 1899. The plug to which the hose was attached at said fire was about 400 feet from said residence; and the pressure was not sufficient to throw the stream over a chimney 26 feet and 4 inches high. Witness measured the chimney and saw the failure.

Respondents proposed to prove the following by J. S. Lowrey:

That after the hose was attached to the hydrants of the waterworks company on one of the principal streets of the city, when an effort was made to extinguish the Farnum House fire, the water could be thrown barely to the top of the kitchen, one story part of the building, not over 22 or 23 feet high.

Respondents proposed to prove by F. M. Jennings, the following:

As to the dry kiln fire in 1896, that the stream was never over 25 feet high; and that at the Grier residence, consumed in 1898, the pressure was not sufficient to throw the water on a servant's house in the yard, not more than 20 or 25 feet high; and that he saw a man carry the nozzle nearly to the top of said house and pour the water from it. It would not have thrown a stream. Also
270 the Parks fire in 1899, the pressure was not sufficient to throw a stream to the top of the house, it not being more than 30 feet high. And also substantially the same as to the oil mill fire.

Respondents proposed to prove by A. M. Raines, the following:

That at the oil mill fire the pressure was so weak that in order for witness to throw the fire on the end of the stable, which was adjoining said property, and it was not more than fifteen feet high, witness was compelled to put the end of his thumb over the nozzle so as to make it squirt a small stream on said stable and keep it from catching fire from the heat of the other fires. That said property was on one of the principal streets of the city. Witness was at the Parks fire and in order to prevent the building on the opposite side of the street from catching fire, it was necessary to go on top of the veranda so as to be able to throw the water from the hose on

the roof of said building, which was a one story building not more than twenty feet high.

Respondents proposed to prove by E. L. Rainey, the following:

That the stream at the Grier fire in 1898 could not be thrown to the top of a one-story frame house not more than 20 feet high. That at the Parks fire the stream could not be thrown more than 15 feet high; and that it was necessary to get the water on top of the house, 24 feet high, to carry the nozzle to the place where needed and let the water pour out.

Respondents proposed to prove by A. J. Carver, the following:

That when the Farnum house burned in 1898, he noticed
271 that the pressure from the hydrants of the waterworks company was very poor and inadequate at first but that later the pressure was very much better. The cause of this improvement witness is not able to state, as the city's fire engine was soon put in operation and the water was pumped from the cisterns of the city as well as from the hydrants.

Respondents proposed to prove by Charles Deubler, the following:

As to the Baldwin & Company and Geise dry-kiln fire in 1896, that the pressure was wholly insufficient to throw a stream more than 25 feet high. That at the Variety Works fire the pressure was lacking and the fire engine had to be called into requisition to accomplish anything.

Respondents proposed — by J. R. Mercer, the following:

That at the Parks fire in 1899, the pressure from the hydrants was so inadequate, the holder of the nozzle had to get on top of an adjacent building in order to get water there; and that the water could not be thrown more than 30 feet high.

Respondents proposed to prove by W. F. Locke, the following:

That at the Whitehard fire in June 1897, the waterworks company's hydrants were insufficient to throw the water 20 feet away from the nozzle.

Respondents proposed to prove the following by F. E. Clark:

That he attended the fire which burned the residence of Robert Smith in Dawson in 1899; and that the pressure was not sufficient
to throw a stream over a chimney about 25 feet high at said
272 fire.

Respondents proposed to prove the following by T. L. Guerry:

That he was at the Bob Smith fire in 1899. That there were about 200 feet of hose attached to the hydrant; and there was not enough pressure to get the water on top of a chimney 25 feet high.

Respondents proposed to prove by W. C. Evarts, the following:

That he attended the fire which burned the residence of Mr. Hamilton, September 20, 1898, in Dawson. That 400 feet of hose were used. Fire was witnin 400 feet of the pumping of the Dawson Waterworks Company, said county (Terrell,) the hose being attached to a plug of said company, and the water could not be gotten from the nozzle to the top of the veranda, 12 feet high.

Respondents proposed to prove by W. E. Riordan, the following:

That he was present at the lumber kiln fire in Dawson in 1896; and that the pressure of the water from the hydrants of the waterworks company, was not sufficient, during his observation, to throw the water ten feet from the nozzle.

The MASTER: The question now under consideration is not the effect of this evidence, but its relevancy to the extent of making it admissible. Should the master err in excludiug testimony, the result would be to put the parties to additional expense, cost and delay; and for that reason I am liberal in my views, that is,
273 I try to be, as to the admissibility of the testimony. Nevertheless, if I am clear that testimony is not relevant, and should not be admitted, I feel I should not admit it.

Now the contract in this case provides for the construction of a system according to specifications given, and that there should be erected a reservoir of a certain capacity, and of such a height as to afford a pressure under the circumstances stated in the ordinance. As to the system it is provided that the system shall be thorough and complete; and that a supply of water for the purposes stated shall be maintained. I think that imposes on the waterworks company the duty of maintaining an efficient system and keeping a sufficient supply of water on hand.

Now any evidence showing that this reservoir was not of the required height, would be entirely admissible. Any evidence showing that under the test provided in this contract, or under conditions substantially the same, showing that the contract was not complied with, I think would be admissible. I shall permit you to prove that the tank leaked. You may introduce evidence to show, if you choose and can, that the tank was not kept filled with water. You may also introduce evidence to show, if you can, under these conditions, or conditions substantially like these, that the pressure was not sufficient to raise the water 50 feet vertically, in still air. I shall permit you to show that there was a total failure of pressure for a greater or less length of time; and if the failure is total, then there is no pressure.

I hardly think we can go into the realm of speculation as to what the pressure would be under conditions which vary substantially and materially from those laid down in the ordinance. In
274 other words: whether the water pressure was weak and continued so for a short length of time under conditions that surrounded the lumber kiln fire. I hardly see how that illustrates the issue at all. I will permit you to introduce evidence to show that the company has not in any respect maintained its system as it should have done. As I have admitted evidence to show that there was a new tank made, I will admit evidence showing that the tank leaked. You may show that the pipes throughout the city were not properly maintained or flushed; and that the source of supply has been allowed to be contaminated; and that the service was improper. I will permit all that; but I don't think I should

permit evidence as to what occurred at particular fires under conditions totally dissimilar from those stated in the contract.

Mr. GUERRY: Your honor's ruling, as I understand it, I would like to show in the record, as invoked upon the offer to prove certain facts, which I have stated, by those particular witnesses, your honor rules I cannot prove.

The MASTER: You stated what you expected to prove?

Mr. GUERRY: By way of illustration.

The MASTER: In conformity with my general ruling, I will exclude the evidence offered, unless it is proposed to show in connection therewith that there was a total failure of pressure, or that the surrounding circumstances were substantially the same as those laid down in the contract for a test. If you can come up to those conditions you may proceed."

The city says that the rejection of this proposed evidence by the master was material error of law on a vital question in the case, viz: whether the system of waterworks as constructed and operated, came up to the requirements of the contract as to pressure, the same being relevant and otherwise competent; and the city insists
275 upon a reopening of the case that this testimony be heard and reported and considered and given due effect, together with such other testimony of the same character as said witness would give upon re-examination, in connection with the testimony already reported on the same issue.

Thirty-fifth. The court erred in said decree in overruling the second exception of law of this defendant, which was as follows:

The city says that the two principal issues of fact necessarily arising under the law and actually made by the allegations of the bill and answer were as follows:

First. Whether the waterworks company had performed its contract as to pressure, both in the proper construction of its system and in its service.

Second. Whether it had performed its contract properly in the kind of water supplied.

The city says that the master erred in law in failing and refusing to decide both of these questions.

Thirty-sixth. The court erred in said decree in overruling the third exception of law, which was as follows:

The city submits that one of the material issues arising under the law and actually made by the pleadings in the case, was whether the waterworks company had performed its contract as to pressure both in the proper construction of its system and in its service; and the master failed and refused to make any finding upon this issue, either the one way or the other.

The city says that the master in such failure and refusal committed an error of law.

276 Thirty-seventh. The court erred in said decree in overruling the fourth exception of law, which was as follows:

The city submits that one of the material issues arising under the

law and actually made by the pleadings in the case, was whether the waterworks company had performed its contract in the kind of water supplied, and the master failed and refused to make any finding upon this issue, either the one way or the other.

The city says that the master, in such failure and refusal, committed error of law.

Thirty-eighth. The court erred in said decree in overruling the fifth exception of law, which was as follows:

The city says that the master erred in law in finding for the complainant against the city and in recommending any relief whatsoever or any recovery of any sum whatsoever, because the complainant's right to recovery and relief depended upon the performance on the part of the waterworks company, of its contract as to pressure, both in the proper construction of its system and in its service and upon performance of its contract to supply the right kind of water to the citizens, viz: water suitable for domestic, sanitary and other useful purposes, and there was no finding by the master that the waterworks company had performed its contract in either particular, the master properly failing and refusing to find in favor of such performance.

Thirty-ninth. The court erred in said decree in overruling the sixth exception of law of this defendant, which was as follows:

The city says that the master erred in law as follows: In finding and recommending that an injunction be granted the com-
277 plainant against the city, that the city pay the complainant the sum of the water rental due and unpaid from January 1st, 1896, with interest on each installment thereof as the same matured, at the legal rate of seven per cent. per annum after maturity, and that the city be required to specifically perform the contract forming the subject of the suit, when under the law and under the pleadings, there was no right of recovery or relief on the part of the complainant against the city, without performance on the part of the waterworks company of its contract to continue during the existence of the contract, to furnish a sufficient supply of water to produce a pressure on the mains such that from any hydrant located on the principal streets, a stream of water would be projected fifty feet vertically in still air, through one hundred feet of fire hose, with a one inch nozzle attached; and to supply the city and its inhabitants with suitable water for domestic, sanitary and other useful purposes; when the master had not found and does not find that said contract had been performed but in effect on the contrary finds that the same had not been performed, in his findings of fact numbers eight and nine in his report as follows:

Finding of Fact No. 8: "The source of water supply adopted by the water company from among those designated by the city consisted of a running stream, into which directly flowed the water of what is known as Dunn's spring, some four hundred yards above the take-in of the water company. These waters were among those analyzed by the State chemist, and by him pronounced safe and sure.

The water shed does not cover an extended area. The stream from above flows through land which is more or less marshy, and upon which there is considerable vegetable growth. The surface water from adjoining hills on one side of the stream flows in above the point of supply. On the crest of these hills are several small residences, the
278 washings from whose premises flow into the stream. There is also on the water shed a scaffold, which has been used from time to time for the slaughtering of cattle in a small way. The stream from which the water supply is derived is not protected from these surface washings by means of dikes or other devices. The condition of the water shed is substantially the same now as it was at the time of the selection and as it has been since. The evidence does not disclose when the slaughtering of cattle began, or how extended it has been. The water is not filtered but is taken directly from the stream and pumped to a standpipe or reservoir in the city, from which it is distributed by gravitation through mains and pipes to customers.

I find from the evidence that at certain seasons of the year the water is safe and pure, as shown by the analysis of the State chemists; at other seasons, during the periods of continuous rain fall, the water is muddy and must to some extent be contaminated by reason of the surface washings from the shed as described. It was disclosed in the evidence that an analysis of the water had been made at the instance of the city or some of its citizens, but this analysis was not offered in evidence, nor was any expert evidence as to the quality of the water introduced, excepting the analysis of the State chemist as above referred to."

Finding of Fact No. 9: "The water company erected a reservoir exceeding capacity that required by the contract. The height of this reservoir from its bottom to the surface of the earth below was 65 feet. Upon a test by the city it was ascertained and declared that the system met with the requirements of the contract, and I therefore find that the reservoir was of the prescribed height and capacity. Much evidence was introduced and offered to show
279 that sufficient pressure had not constantly been maintained. It appears that on one occasion the reservoir was found to be empty, but this occurred shortly after the construction of the waterworks and before the repudiation of the contract by the city, and is therefore not material to be considered in the present case. At times the reservoir leaked. On one occasion the local superintendent of the water company tested the pressure from a point on what is known as an end pipe. The water failed to reach a height of fifty feet vertically. It was shown that this test was a voluntary act of the local superintendent, without notice to the officers and owners of the water company or to the city. Gauges indicating the height of the water in the standpipe, and the consequent pressure, were placed at the pumping station of the water company and also in the engine house of the city fire department. Excepting on rare occasions the reservoir was kept supplied with water sufficient to produce the

required pressure. No complaint concerning the character of the service or the amount of the pressure was made to the water company until after the institution of the present suit. The water company has since erected a new reservoir of more than double the capacity required in the contract and of a greater height than the first reservoir. Since the erection of this new reservoir there has been no complaint or question as to the pressure."

Fortieth. The court erred in said decree in overruling the seventh exception of law of this defendant, which was as follows:

The city says that the master erred in law in his first conclusion of law in finding therein that the court had jurisdiction of the cause on the ground that a Federal question was involved. Such
280 question depended on the existence of an exclusive franchise, and it is clear none existed.

Forty-first. The court erred in said decree in overruling the eighth exception of law of this defendant, which was as follows:

The city says that the master erred in law in his first conclusion of law in finding that there was equity in the complainant's bill and that therefore the same should be maintained, because the city says that there was no equity in said bill and the complainant had a plain and adequate remedy at law for the enforcement of all its rights.

Forty-second. The court erred in said decree in overruling the ninth exception of law of this defendant, which was as follows:

The city says that the master erred in law in his second conclusion of law in finding in favor of the complainant upon the question of *res judicata* as raised in the city's answer, the city having plead that prior to the filing of said bill and on the 14th day of March, 1899, the supreme court of Georgia in the case of the said Dawson Waterworks Company *versus* the said City, had adjudged that under the constitution and laws of Georgia and its settled policy, the contract sued on in said bill was void *ab initio*, and that complete performance on the part of the waterworks company did not estop or prevent the city from pleading the illegality of the contract, and that the complainant in the bill was a mere privy and assignee of the cause of action involved in the decision by the supreme court of the State and had become such since said decision, and that all the questions and issues made by the bill as amended were *res judicata* as to the complainant as well as to the waterworks company, and the facts so averred had been fully proved by a duly exem-
281 plified record in said cause from the said supreme court and had not been denied; because the city says that under the law and said undisputed facts, the said questions were *res judicata* and the decision of the supreme court of Georgia upon said questions, was binding and conclusive upon and against the complainant and the contract sued on by complainant in said bill was null and void, and so adjudged to be. See sub-division No. 1.

Forty-third. The court erred in said decree in overruling the tenth exception of law of this defendant, which was as follows:

The city says that the master erred in law in said second conclusion of law in finding therein that the complainant was not a privy of the waterworks company as to the suit in the State court so as to be exclusively bound thereby, and that the doctrine of *res judicata* did not apply to it. Same subdivision.

Forty-fourth. The court erred in said decree in overruling the eleventh exception of law of this defendant which was as follows:

The city says that the master erred in his second conclusion of law in finding therein that the contract sued on by the complainant was valid notwithstanding the supreme court of Georgia had held such a contract to be invalid because in violation of the constitution of the State, in the cases of Cartersville, etc., *versus* Cartersville, 89th Georgia, 683—Cartersville, etc., *versus* Cartersville, 89 Georgia, 689, and City of Dawson *versus* Dawson Waterworks Company, 106th Georgia, 696, and in holding that this court was not bound to follow said decision of the supreme court of Georgia as to the validity of the contract in question; because the city says
282 that under the law of the United States and under the decision of the Supreme Court of the United States, it is the bounden duty of this court to follow said decisions of the supreme court of Georgia, because they were rendered in construing the constitution of the State, and a contract made in said State and governed by its constitution and laws; and because it appeared from the decisions of the supreme court of Georgia, that said court had never made any decision in point contrary to the decisions in the cases named. Subdivision No. 2.

Forty-fifth. The court erred in said decree in overruling the twelfth exception of law of this defendant, which was as follows:

The city says that the master erred in law in the second conclusion of law in finding that the contract sued on did not create a debt in contemplation of the constitution of the State of Georgia, because the city says that the contract did not only create a debt or undertake to do so, but that it had been decided prior to the filing of said bill by the supreme court of Georgia that said contract did create or undertake to create a debt, viz: in the case of Cartersville, etc., *versus* Cartersville, 89 Georgia, 683,—Cartersville, etc. *versus* Cartersville, 89th Georgia, 689,—City of Dawson *versus* Dawson Waterworks Company, 106 Georgia, 696; and other cases. Subdivision 3.

Forty-sixth. The court erred in said decree in overruling the thirteenth exception of law of this defendant, which was as follows:

The city says that the master erred in law in his second conclusion of law in finding therein that the waterworks company had an exclusive franchise to occupy the streets and maintain a water
283 system in said city by virtue of the said contract, because under the laws of Georgia no such franchise could be granted, and because if such franchise could have been granted by the city in any case, it would only be when said city had been expresely empowered to make such grant, and the said city had not

been expressly so empowered under its charter or otherwise. Subdivision 4.

Forty-seventh. The court erred in said decree in overruling the fourteenth exception of law of this defendant, which was as follows:

The city says that the master erred in law in his second conclusion of law in finding therein that the city after making the contract sued on with the waterworks company, had no right to establish and maintain a waterworks system of its own or use the streets of the city in competition with the waterworks company during the life of said contract, because the city says that such construction of the city's contract made the same the grant of an exclusive franchise by the city to the waterworks company, when the city had no power in its charter or otherwise, to make such a grant, and when such a grant by an authority in the State of Georgia would be null and void because contrary to the express provision of the constitution of the State upon such subject; and because if the city had no power to make such a grant it had no power to estop itself from denying that it had made such a grant. A grant or contract that does not exist has no obligation. Subdivision 4.

Forty-eighth. The court erred in said decree in overruling the fifteenth exception of law of this defendant, which was as follows:

The city says that the master erred in law in said second conclusion of law in finding therein that there is no require-
284 ment in the contract that the quality of the water should be other than that furnished in its natural state from the source of supply designated and accepted by the city. The city says that as shown by the evidence and found to be true by the master at the time the water supply was tested and accepted, the same was suitable for domestic, sanitary and other useful purposes, and under the law of the contract it was the duty of the water works company to keep the same in such condition by protecting the same, or to put said water in such condition by filtering it, because the city respectfully submits that to test said water at a time when it is suitable and satisfactory and afterwards to allow it to become otherwise and to supply the citizens of Dawson with it when wholly unfit simply because it had been accepted when fit, would be not only a violation of the contract but a gross fraud upon the citizens and the city. Subdivision 5.

Forty-ninth. The court erred in said decree in overruling the sixteenth exception of law of this defendant, which was as follows:

The city says that the master erred in law in the said second conclusion of law in finding therein that the city could not invoke a forfeiture or plead that the water supplied was not fit for domestic, sanitary and other useful purposes, as a defense to the right of the complainant to relief; because the city says that before the complainant could recover, the water works company must have performed its contract in this particular, especially as the complainant

had based its right to recovery and relief upon such alleged performance, and the city had denied the same, in the mutual pleadings.

More especially would this be true if the master is right in
285 finding as a conclusion of law, that the contract of itself created no debt, and that it contemplated that the city should maintain and perform the water service therein specified from year to year for a period of twenty years, and that as this service should be performed the city obligated itself to pay therefor the sum of $2,000 each year, payable semi-annually, and that if the water company should fail to perform the services, the city would be under no obligation to pay. (For this finding of the master, see division 3 of the second conclusion of law). Subdivision 5.

Fiftieth. The court erred in said decree in overruling the seventeenth exception of law of this defendant, which was as follows:

The city says that the master erred in law in its said second conclusion of law in finding therein that the complainant is entitled to an injunction against the city forbidding it to construct or maintain any system of waterworks of its own in competition with the waterworks company or for the purpose of supplying the city with water for fire protection and for municipal use and that the injunction heretofore granted temporarily restraining the city from issuing bonds for this purpose should be made perpetual. The city says that said injunction could issue only upon the ground that the waterworks company had an exclusive franchise to use the streets of said city for such purpose, when such exclusive franchise does not in law exist and cannot in law exist in the State of Georgia. Subdivision 8.

Fifty-first. The court erred in said decree in overruling the eighteenth exception of law of this defendant, which was as follows:

286 The city says that the master erred in law in said second conclusion of law in finding therein that the complainant is entitled to a mandatory injunction against the city and the waterworks company requiring them and each of them, to specifically perform the contract as essential to the protection of the security of the bonds; because the city says, first: That said contract is null and void under the constitution and laws of the State of Georgia; second: because said contract in a case between the waterworks company and the city had prior to the filing of the bill, viz: on the 14th day of March, 1899, was adjudged to be null and void; and because the complainant is bound by said decision as an alternative payee, acquiring as shown by the proof and found by the master, its right to sue subsequent to the rendition of said decision; and because under the law and undisputed facts, the said complainant was bound by said decision as a mere privy and assignee of the said waterworks company. Subdivision 8.

Fifty-second. The court erred in said decree in overruling the nineteenth exception of law of this defendant, which was as follows:

The city says that the master erred in law in his said second con-

clusion of law in finding therein that the city and waterworks company should be required to specifically perform said contract, because the city says that said contract was not of such a nature as to justify the remedy of specific performance, especially so far as the city is concerned, because the city says that the justice of performance on its part would depend upon previous full performance on the part of the waterworks company, which previous performance on the part of the waterworks company, cannot be assumed in advance as a basis upon which to now decree specific performance here-
287 after on the part of the city. Subdivision 8.

Fifty-third. The court erred in said decree in overruling the twentieth exception of law of this defendant, which was as follows: The city says that the master erred in his second conclusion of law in finding therein that the complainant was entitled to a mandatory injunction against both the city and the water company requiring them and each of them to specifically perform the contract as essential to the protection of the security for the bonds, because the city says that the law of specific performance does not provide that the two opposite parties to a contract may be required in advance to perform such contract for the benefit of a third person who is not such a party to the contract as to have any obligation thereunder to perform on its own part. Subdivision 8.

Fifty-fourth. The court erred in said decree in overruling the twenty-first exception of law of this defendant, which was as follows: The city says that the master erred in law in his second conclusion of law in finding therein that the city should be required to perform the said contract by the payment of the water rentals to the complainant thereunder, because the city says that under the constitution and laws of the State of Georgia, under which said city exists as a municipality and from which it derives all of its powers, the supreme court of said State has decided in construing this contract in a case between the city and the waterworks company, one of the payees under the contract and that one having control of said contract and having alone the right to collect the water rents at the time, the city has no power to make such payment or to lay any tax or to otherwise raise any funds for the purpose of making
288 such payments; and because under such decision the use of any funds for any such purpose by the officials of the city, would be misappropriation of the same and would be violation by said officials of their official oath. Subdivision 8.

Fifty-fifth. The court erred in said decree in overruling the twenty-second exception of law of this defendant, which was as follows:

The city says that the master erred in law in his said second conclusion of law in finding therein that the complainant was entitled to a decree as against both the city and the water company requiring them and each of them to specifically perform the contract between them, because the city says that the law of specific perform-

ance is not applicable to such a contract, and is not an appropriate remedy in such a case. Subdivision 8.

Fifty-sixth. The court erred in said decree in overruling the twenty-third exception of law of this defendant, which was as follows:

The city says that the master erred in law in his general conclusion as follows: In finding in the first division thereof that the objection to the jurisdiction was not well founded in as much as the jurisdiction rests upon the Federal question presented without regard to the citizenship of the parties, because the city says that the alleged Federal question depended upon the existence of an exclusive franchise which itself did not and could not exist under the laws of the State of Georgia, there being no interference existing or threatened as to the franchise of the water company to the extent that the same existed.

289 Fifty-seventh. The court erred in said decree in overruling the twenty-fourth exception of law of this defendant, which was as follows:

The city says that the master erred in law in his general conclusions in finding in the second division thereof that the doctrine of *res judicata* was not applicable to the complainant in this case for the reason that the complainant was not a party or privy to the State court suit, because the city says that under the law the complainant was such privy and was under the contract as plead by complainant, an alternative payee with the water company and the said water company as shown by the proof and found by the master, was as such payee in exclusive control of said contract and the right to collect water rents up to and after the rendition of said decision; the complainant as shown by the bill suing as a subsequent assignee of the right as payee to collect said water rentals.

Fifty-eighth. The court erred in said decree in overruling the twenty-fifth exception of law of this defendant, which was as follows:

The master erred in law in his general conclusions in finding in the third division thereof, that this court was under no obligation to follow the decisions of the highest court of the State rendered after the contract in question had been entered into and the rights of the complainant and those it represents had been acquired thereunder, that the decisions of the State court prior to the execution of the contract were not so long and so firmly established as to constitute a rule of property and that this court will decide independently whether there is a contract and whether its obligation has been impaired, because the city says this court is under such

290 obligation because said decisions were made in pursuance of decisions made to the same effect previous to the date of the contract and were made in construing a contract made in and to be performed in the State of Georgia, and in construing the constitution and laws of the State as applicable thereto.

Fifty-ninth. The court erred in said decree in overruling the

twenty-sixth exception of law of this defendant, which was as follows:

The city says that the master erred in law in his general conclusions in finding in the fourth division thereof that the contract between the city and the water company did not create a debt within the meaning of the constitution and the laws of the State of Georgia but that such contract was valid and enforceable, because the city says that such finding is an erroneous construction of the constitution and laws of the State and in violation of such constitution and laws as construed in its decisions in a number of instances by the supreme court of the State. The city further says that such finding of the master is also contrary to his own ruling in his own report upon the main issue in the case, viz: That the plaintiff had the right to recover such debt without performance and without proof of performance and in the teeth of his own decision that there had not been performance on the part of the water company of said contract so as to entitle it or the complainant to recover water rentals on the ground that the same had been earned by a performance of the contract.

Sixtieth. The court erred in said decree in overruling the twenty-seventh exception of law of this defendant, which was as follows:

The city says that the master erred in law in his general conclusions in finding in the fifth division thereof that the exclusive franchise granted by the city to the water company to
291 use the streets and maintain its system of waterworks, cannot be revoked by the city in its own interests and that its value could not be impaired by competition on the part of the city itself within the term of twenty years during which the city obligated itself to take and pay for the water for fire protection, because the city says that there is no such exclusive franchise; that there has been and is no attempt on the part of the city to revoke any franchise really owned by the water company, and no allegation to such effect in the bill, and because the city does have the right under the constitution and laws of this State notwithstanding the existence of the legal franchise of the water company, to make other provision at the same time for the supply of the citizens of Dawson with water, especially when the water being supplied was unfit for their use. The city respectfully submits that if bound under the law to take and pay for the water of the company for fire protection, the simple and only right of complainant would be to sue for at law and collect the water rentals as the same become due.

Sixty-first. The court erred in said decree in overruling the twenty-eighth exception of law of this defendant, which was as follows:

The master erred in his general conclusions in finding in the sixth division thereof that the city cannot under the facts of the case, forfeit the rights and franchises of the water company for insufficient service or for any failure to supply water of a higher quality

of purity, nor plead such facts in bar of the equitable relief sought; because the city says that there has been no attempt on the part of the city to forfeit any of the rights of the water company
292 on any ground whatsoever and none is alleged in the bill except the exclusive franchise which does not exist and cannot exist under the law; and because the city further says that the city certainly has the right to plead the failure of the water company to perform its contract in furnishing water suitable for domestic, sanitary and other useful purposes, to the citizens of Dawson, the right on the part of the water company to recover being dependent upon such performance and the complainant having no more or different right to collect rentals than that possessed by the water company itself. The city respectfully submits that it was the duty of the water company to furnish after the test was made, water of the same purity as that accepted at the time, and the master having found that such water was not afterwards so furnished, this finding of the master in favor of the complainant's right to recover and its right to the equitable relief sought, is plain error of law.

Sixty-second. The court erred in said decree in overruling the twenty-ninth exception of law of this defendant, which was as follows:

The city says that the master erred in law in his first recommendation that the contract constituting the subject of the suit, be decided valid, binding and enforceable.

Sixty-third. The court erred in said decree in overruling the thirtieth exception of law of this defendant, which was as follows:

The city says that the master erred in his second recommendation that an injunction be granted to complainant prohibiting the city from negotiating, selling or disposing of the bonds authorized to be used in construction of a water system by the city, and from
293 constructing or maintaining or operating any waterworks in the city of Dawson for the purpose of supplying either the city or its inhabitants with water for fire protection or domestic use; because the city says that under the constitution and laws of this State it is not only its right but its duty to do so, especially as it appears, as in effect found by the master in his report, that the said city and its inhabitants are not being sufficiently supplied with water suitable for domestic, sanitary and other useful purposes.

Sixty-fourth. The court erred in said decree in overrruling the thirty-first exception of law of this defendant, which was as follows:

The city says that the master erred in law in his third recommendation that the city be enjoined from revoking or attempting to revoke, the rights and franchises granted the water company under the contract during the term of twenty years within which it contracted to take and pay for water from the water company; because the city says that it was not alleged and does not appear that the city was attempting or threatening to revoke or contemplating any revocation of any of the rights and franchises of the water com-

pany under the said contract during the term of twenty years or otherwise.

Sixty-fifth. The court erred in said decree in overruling the thirty-second exception of law of this defendant, which was as follows:

The city says that the master erred in law in his fourth recommendation that the city shall pay the complainant the sum of water rentals due and unpaid from January 1st, 1896, with interest on each installment thereof as the same matured at the legal rate of seven per cent. per annum after maturity; because the city says
294 that the contract for the payment of said rentals is null and void and has been so adjudged because violative of the constitution and laws of this State and because before the water company or the complainant could recover such rentals or any part thereof, performance and proof of the same of the contract on the part of the water company, was and is necessary, and because there has been no such performance and no finding by the master in favor of such performance or proof of performance, but on the contrary in his report a finding to the effect that there had been no such performance.

Sixty-sixth. The court erred in said decree in overruling the thirty-third exception of law of this defendant, which was as follows:

The city says that the master erred in law in his fifth recommendation to the effect that the collection of the taxes due the city should await an accounting for the purpose of ascertaining what might be due the water company by the city for such water as may have been used by the city itself; because the city says that the said taxes being due and being so held to be due, it is contrary to the constitution and laws of the State of Georgia to arrest process for the collection thereof for the reason stated by the master in such recommendation.

Sixty-seventh. The court erred in said decree in overruling the thirty-fourth exception of law of this defendant, which was as follows:

The city says that the master erred in law in his sixth recommendation that the city and the water company be required to specifically perform the contract forming the subject of this suit and to severally comply with their respective obligations arising and to arise
295 thereunder, and that to such end a mandatory injunction be issued; because the city says that if the water company was performing its contract as alleged in complainant's bill, there was no ground for a decree for specific performance on its part and if it was not so performing its contract the complainant had no right to recover water rentals, or to any of the relief prayed in the bill; and because the contract was not such a contract as can be specifically enforced under the laws and practice in the United States courts, especially as to the city as in any view of it, performance on its part would be dependent upon performance on the part of the water com-

pany, and the court has no right to assume for the purpose of rendering a decree of specific performance as to the city in advance on the assumption that the water company will perform and that the city will not; and because this very contract has been decided by the supreme court of the State of Georgia to be null and void in a suit between the water company and the city and that the city was under no obligation to perform the same and that it had the right so to plead; and because it has been also held in said decision in effect that the city has no legal or constitutional power to collect from its citizens by taxation or otherwise, any moneys in discharge of any obligation under said contract, and the mandatory injunction as recommended would require the officials of tho city to violate the constitution and laws of the State as construed in the highest court of the State, and to violate their official oaths. The city respectfully submits that while the water company is made a party defendant to said bill, no complaint was made therein against it by the complainant and no ground therein is set forth for a right of recovery or relief against the city or the water company and that therefore the complainant is entitled to no decree against
296 said company for the purpose of reaching the city through the same or for any other purpose whatsoever.

Sixty-eighth. The court erred in said decree in overruling the thirty-fifth exception of law of this defendant, which was as follows:

The city says that after being served by the master with the draft of his report and notified to appear and make suggestions of amendment and change of the same, the city so appeared on the 17th of April last and made the following suggestions among others:

That the master had omitted a material fact proved by the testimony of one of the witnesses of the complainant, viz: F. A. Rugles (see Record p. 79) as follows:

That he (witness) removed the timbers of the old tank when it was torn down (since the filing of the bill) in order to construct a new one; that there was at that time in the bottom of said old tank, four inches (in depth) of foul and muddy sediment.

In making said suggestion the city submitted that inasmuch as a witness introduced by the complainant had testified to this fact and his testimony was undisputed it became an established fact in the case and one of vital importance as showing one of the causes for the contamination of the water supply and as a fact disproving the contention of the complainant that the waterworks company had up to the time of the construction of the new tank, performed its contract in supplying the right kind of water for the citizens of Dawson; and the city thereupon suggested that the master report said evidence and a finding of the fact which it establishes. The master admitting the truth of the allegations of the city upon this point, refused the suggestion on the ground the report should
297 not be burdened with statement of the evidence but should be confined to the finding of the ultimate facts.

The city now says that the master erred in law in not making

such report and finding originally and in not doing so in compliance with said suggestion, because the city says this evidence was too brief to be burdensome and that coming from a witness of the complainant and not being contradicted but largely corroborated, it established a vital as well as ultimate fact, viz: that the water supplied by the water company to the citizens by means of the old tank, was unsuitable for domestic, sanitary and other useful purposes, and that therefore the water company had failed to perform and was at that time failing to perform its contract as to the kind of water to be supplied, and that therefore the complainant was not entitled to any recovery or relief.

Sixty-ninth. The court erred in said decree in overruling the thirty-sixth exception of law of this defendant, which was as follows:

The city also submitted as a suggestion of change of the original draft of the master's report as follows: That Mr. James H. Dawes, superintendent of the waterworks company, as a witness of the complainant, testified as follows: (See p. 115).

"The Dawson Waterworks Company had charge of the original litigation and all these demands against the City of Dawson for water rentals up to the decision of the supreme court of Georgia already referred to."

The city then and there submitted that as this testimony was from a witness of the complainant and was undisputed the fact was established, and being a material one should be reported to the court, and requested the master to make such finding in his report. The master refused said suggestion on the ground that such testi-
298 mony could be burdensome though brief and because the finding would not be of an ultimate fact. The city says that the master erred in law in not having reported said evidence originally and a finding in accordance therewith and also in not doing so as suggested because the city says that by means of such testimony of the witnesses of the plaintiff, the fact became established that the water company as one of the alternative payees under the contract, had charge of the original litigation on all the demands against the city for water rentals up to the decision of the supreme court of Georgia already referred to, and was therefore concluded as to all of such demands and the complainant having sued as alternative payee upon assignment subsequent to said decision, was also concluded thereby as a privy.

Seventieth. The court erred in said decree in overruling the thirty-seventh exception of law of this defendant which was as follows:

The city shows that it also made the following suggestions of change in the master's report, viz: that J. A. Horsley, superintendent for the waterworks company and witness for complainant, testified as follows: (page 130)

"My recollection is during the year 1900 and maybe 1899 and 1900 during the very dryest season, the pressure went down three or four times. It was run down so there was no pressure. Several

times early in the morning it would not run out of the hydrant. It was this way I suppose two or three times."

The city submitted that this evidence being from the complainant's witness and not being contradicted, the facts testified to became established and were material on the question as to whether
299 the waterworks company complied with its contract in keeping up its pressure, and ought to have been reported in a finding of such fact by the master; and requested the master then and there to take such finding, and the master refused. The city now says that on so doing the master erred in law, because said facts being testified to by witness of the complainant and not contradicted but largely corroborated, were established, and that by reason of such facts the proposition was also established that during the year 1900 there was a failure to the extent described on the part of the company to keep up the pressure as required by the contract, and at times to have any pressure whatsoever; and that therefore the complainant had no right to recover. The city respectfully submits that in such a contract for fire protection, the constant existence of the required pressure is vital and of the very essence of the same and that upon the failure of such pressure as described, without sufficient excuse, such a contract would be entirely broken and all right of recovery and relief destroyed.

Seventy-first. The court erred in said decree in overruling the thirty-eighth exception of law of this defendant, which was as follows:

The city says that it also submitted as a suggestion of change that said J. A. Horsley, witness for the complainant, testified (page 135) as follows:

"Occasionally they (the people) would tell me in effect that the water was muddy and unfit for use and smelled badly, and the pressure was insufficient, for instance on these water ends, and asked me to flush that main so the water would clear up, and I would do it. They said the water was muddy. Once or twice they would tell me about its being muddy somewhat smelling bad. Dur-
300 ing that time I remember complaints made several times about the pressure. My recollection about the first complaint was made during the Whitehard and Green fire in 1897. I have seen buzzards up there (on the tank) in the day."

The city then and there submitted that these facts testified to by witness for the complainant and not being disputed, were established and material, and ought to be reported, but the master refused said suggestion. The city now says that the master in doing so, erred in law, because the city says the said evidence brought home notice full of complaints both as to pressure and as to the unsuitability of the water and also notice that the company was not performing its contract as to pressure or kind of water, and was therefore an ultimate and controlling fact to be found by the master.

Seventy-second. The court erred in said decree in overruling the

thirty-ninth exception of law of this defendant, which was as follows:

The city shows that it also made to the master the following suggestion of change in his report: That inasmuch as the two principal issues of fact in the case were as follows: First, whether the waterworks company had performed its contract as to pressure both in the proper construction of its system and in its service; and second, whether it had performed its contract in the kind of water supplied; the master should have found in the negative both propositions, but the master refused said suggestion. The city now says that the master erred in law in such refusal and in its failure to have so found originally, because the master's own report in his findings of fact numbers eight and nine, showed that he had reached such conclusion, and such a finding would have been conclusive against the company on all right of recovery or relief.

301 Seventy-third. The court erred in said decree in overruling the fortieth exception of law of this defendant, which was as follows:

The city says that the master erred in law in finding and recommending any recovery or relief in favor of the complainant, because under the law and the pleadings, and the facts as found by the master himself, there was no right of recovery or relief in the complainant.

The city respectfully submits that the master misconstrued the contract and misconceived the issues made by the law and pleadings in the case.

Under the law and the pleadings and the contract sued on, the material issues were whether the water company had performed its contract with the city by furnishing it with the proper degree of water pressure and by supplying its citizens with the proper kind of water, and before the complainant had any right to recover it was encumbent upon the complainant to prove that the waterworks company had performed its contract in both of these particulars during each period of time for which the complainant sued to recover and to prove that during the entire time it had performed its contract in both particulars in order to entitle it to injunction for any purpose, or to any decree for specific performance. The master makes no formal finding upon either of these issues but does report findings upon the evidence in his findings of fact numbers eight and nine, which clearly negative the proposition that the water company had performed its contract in either particular, and yet he finds in favor of the complainant in toto so far as the relief sought by it is concerned while *formerly* ignoring the real issues of fact in the case as distinctly raised by the complainant's bill and the city's an-

302 swer, basing his finding so far as these questions were concerned, upon the erroneous conclusions of law that the city had no right to plead and defend on the ground that the water company had failed to perform its contract, because the city as found by the master had failed to make such defense as against the payment

of water rentals up to the 1st of January, 1895, and had renounced the contract in 1894, on the ground only that the same was illegal.

The city respectfully submits that it was not estopped at law or in equity for any such reason from defending on the ground of non-performance subsequent and during the years now in question.

It further submits that the obligation of the water company under its contract was not simply to construct a system that would at a given time and under prepared conditions produce the required pressure, but that after constructing such a system that it would keep it in the condition to produce such pressure at any and all times for the extinguishment of fires which are liable to occur at any and all times and without notice.

The city further submits that the further obligation of the water company in said contract was not simply to have at a particular time and under favorable conditions a kind of water suitable for domestic, sanitary and other useful purposes so as to successfully stand a test, but it was the duty of the water company to always have said water in as good condition and as suitable when supplied to the citizens either by protecting the water from contamination or cleansing it after becoming contaminated.

The city further submits that the tests of pressure and of quality established the facts at the time that the system in its then
303 condition could produce a pressure and that the water in its then condition was suitable, and also established the standards of capacity and quality which it was incumbent upon the water company to maintain.

The master erred in law in holding in effect that these tests established conclusively that the pressure and quality had thereafter been maintained.

The city further submits that all the findings and recommendations as above stated in favor of the complainant, were erroneous in law in so far as they depend upon the findings of the master as matter of fact that the city had been using the water of the company for the extinguishment of fires, because the city says that such could not be true either in law or in equity except to the extent of the value of the water so actually used, because the city says that under such a contract for such a purpose the use of the water or attempted use of the water by the city for the extinguishment of fire, would not create an estoppel as the city would of necessity seek to save its inhabitants and their property from destruction and would have the right to resort to such means as were at hand for that purpose, especially such means as would be supposed to have been provided for such purpose. To apply the doctrine of estoppel in such a case would be to put every city in the power of its water company because the latter could by making pretense of a supply of water, reap all the benefits of an actual performance of its contract and the city by an attempted use of the water bound to pay for the same

whether the use and benefits of the same were enjoyed by the city or not.

Besides, the city respectfully submits that since the grant of the temporary injunction in the case, to-wit, on the 16th day of September, 1899, the city has had no authority without violating the same, to prevent the use of the water of the company by its offi-
304 cials and therefore such use would not be binding upon the city by way of estoppel or otherwise.

The city further submits in support of this exception of law, that both by the terms and nature of the contract, the water company was bound to perform the same or tender such performance as would be equal to performance being at the time prepared to perform the obligation in said contract both as to pressure and as to kind of water, before it could demand acceptance of or pay for, performance as to either of the obligations of the city.

Seventy-fourth. The court erred in said decree in overruling the forty-first exception of law of this defendant, which was as follows:

The city says that the master erred in law in recommending and finding as matter of law, that the city shall pay the complainant the sum of the water rentals due and unpaid from January 1st, 1896, with interest at seven per cent. per annum after maturity, because the city says that the master had made no finding of fact to this effect or upon which to justify such a recommendation or finding of law.

Seventy-fifth. The court erred in said decree in overruling the first exception of fact of this defendant, which was as follows:

The master erred in his sixth finding of fact as follows: That no other means for fire protection was afforded by the city (than that of the water company) so that it must have been recognized that in an emergency of fire resort to the use of the water of the water company was necessary and inevitable and that the city did not forbid the use of this water by its fire department and must have known that it was being continuously so used.

305 The city submits that the evidence showed that the city had other means for fire protection, viz: the same it had before the waterworks were constructed. That the city did forbid the use of the water by its fire department and that it had notified the company directly and through its superintendent Horsley, that the contract was at an end. In support of this exception the city refers to a finding of the master in this same finding of fact, to the effect that the city on the 14th of December, 1894, notified the water company that unless a new agreement could be reached between them as to the subsequent use of the water for one year from January 1st, 1895, it would not be liable under the contract after the date named; and that the water company declined to enter into any agreement, etc.; as well as the proof in support of this finding.

In further support of this exception of fact, the city refers to the following testimony:

That of A. J. BALDWIN, mayor, who testified as follows (as will appear on p. 342–3 of the evidence):

"I was mayor of Dawson in 1894–95–96; remember the action of the mayor and council relative to the abandonment of the contract with the waterworks company in August 1894. After that I wrote the waterworks company at the request of the council, in December, giving the company notice of the action of the city. The letter is the one that is in evidence. I gave notice to Mr. Horsley, the superintendent the latter part of '94 or early in January, I think in 1894, that the city would not be bound for water any more. I also notified Bill Patterson the colored fireman and R. A. Bishop foreman of the Mechanics' Fire Company. When I notified Horsley I told him in substance about the letter I wrote that the city was not bound for the water any longer; that we are not going to
306 carry out the contract made by the former council. We did not consider it binding; that the council had repudiated the contract. I told him council would not be liable for any water." (For letter of Baldwin referred to, see report of evidence p. 329) Page 347 *et seq.* (Baldwin) "The city had same volunteer fire company after January 1st, '95 it had before. City didn't exercise authority over the fire company 1895–96–97–98–99, but gave tax exemptions. It was necessary to have fire company to operate the engine and chemical engine we had even if there was no waterworks. We had a supply of water independent of the waterworks, in six cisterns in the street. The city gave no direction to firemen or fire organization during the years named to use water of company; never gave them any authority to use it; they knew the contract had been abandoned by my having notified the parties. They had no authority so far as the city was concerned, during these years, to use the water of the water company. If the city gave any direction for them to use it that I know of. The mayor gave no such direction or permission. After '94 I never did, and never empowered anyone else to do so. (Pages 376 *et seq.*) I was mayor in '95. Was at bakery fire. The people used the company's water then. My recollection is that I took hold of the hose then as I have at all fires. I do not think that I handled the nozzle. I didn't assist as mayor any more than I did when I was not an official. I helped use some of the water. Even now if I go to fires and see it is necessary I take hold. I did at any time during 1895–96–97. I was mayor during these three years. I always took an active part; helped to use the hose. I did take hold of the nozzle if I could use it. If Mr. Horsley ever notified me that they expected the city of Dawson to pay for the water, I don't recollect it.

307 DR. J. G. DEAN, witness (page 396 *et seq.*)

"Member of council since 1893 to present time. During this time have seen water used by any and every body; saw people to whom city had given exemptions use water just as individuals; was present and saw it. Think other members of the council were

present and saw it. Never forbid them from using it, strictly, so far as I know; used the apparatus kept in the building belonging to the city, which were returned after the fire; returned by those who had exemptions and others. Bought new hose '95 and '96. Had the same arrangements after January '95 we had before. Fire engine not used except in a few of the fires; not over two or three.

R. L. MELTON, witness (page 435 *et seq.*)

"In 1894–'5 was alderman and chairman of fire committee which had especial jurisdiction over fire department. Remember action of council in 1894 in renunciation of water company's contract. Soon after that had two cisterns pumped full of water and Roberts overhaul engine. This was about the 1st of 1895. The fire company had a row about that time and went to pieces. Bishop managed one of the fire companies at the Variety works. I notified him we had nothing more to do with the city waterworks and must have nothing more to do with the hose. The city waterworks attached their hose to the Variety works. I told Mr. Roberts we had no contract with the waterworks company and he could not use their water any more.

JOHN SEAY, (page 443 *et seq.*)

"From '94 to '98 I was chief of police, this city. The organization of the fire department was very poor, I thought. I was mem-
308 ber of the fire company. The paid fire department was or ganized about 1899. Up to this time, during those years, most everybody in general that got there first, did the work of putting out the fires. It was the work not of any particular organization, but generally of the crowd that assembled. I always tried to get there. I remember one time taking the reel over to Dr. Dean's; don't think there was a man that belonged to the fire company there except Robert Baldwin. He helped pull it over there. There were sixteen in squad. We were the only two firemen in it; and two negroes helped us, not members.

CHAS. DEUBLER, (502–3)

"Resident since '73. Have been in council off and on ever since have been here. Have been chairman of the fire committee, engineer, etc. Engineer ever since they got an engine, except one or two years I quit. I have had experience in dealing with water for fire plugs and engines, hose and nozzle, for the purpose of extinguishing fires, ever since I have been here. I think since they bought the engine in '85, somewhere along that time. Since then have been familiar with the different kinds of apparatus the city owned for fire purposes, which consisted first of a chemical engine 120 gallons, hose reels, steam fire engine, two reels. During those years they kept from 600 to 1500 feet of hose. One reel carried the other 400. The nozzles run from half an inch to an inch.

Seventy-sixth. The court erred in said decree in overruling the second exception of fact of this defendant, which was as follows:

The city says that the master erred in finding in his sixth finding of fact as follows: In finding that notwithstanding the city
309 has repudiated the contract it has continued to enjoy the fire protection afforded by the waterworks company and to use the water for that purpose on every occasion in the same manner and to the same extent that it did prior to its repudiation of the contract.

The city says that the proof showed not only a renunciation of the contract by the city, but the abandonment by the city of the waterworks system and the means it afforded for the extinguishment of fires and that the use thereafter of the water of the company for the extinguishment of fires, was by the people indiscriminate, including the officials of the city, who were acting in their natural capacity and not as officials and not as such being authorized to act.

In support of this exception, the city refers to the evidence brief-in the foregoing exception of fact, viz: exception of fact No. 1, and also of the injunction granted in the case on the 14th of September, 1899, and submits that the master erred in fact in finding that any use of water was the act of the city, after the grant of said injunction, or the renunciation of the water contract in 1894, as shown by the undisputed evidence and the finding of the master thereon.

Seventy-seventh. The court erred in said decree in overruling the third finding of fact of this defendant, which was as follows:

The city says that the master erred as follows in his eighth finding of fact:

First. In making a partial report only of the facts.

Second. In finding that the condition of the waterworks is substantially the same as it was at the time of the selection thereof and has been since, because the evidence showed that the scaffold and butcher pen and the slaughter of cattle and the leavings of
310 the offal thereat were begun, maintained and carried on after the selection of said source of water supply.

Third. In not finding the causes of contamination as shown by the evidence and not disputed.

Fourth. And in not finding as a matter of fact that the causes of contamination, viz: the slaughter of cattle, the leaving of offal and the presence of surface closets, lots, etc., at residences within the area of drainage, were without the limits and jurisdiction of the municipality.

Fifth. In not finding that the waterworks company had failed after full notice of the causes of contamination, to protect the said water supply therefrom.

Sixth. In not also finding that because of such contamination and under the undisputed evidence of many witnesses in the case, the water of said company furnished to the citizens of Dawson, was so

muddy, filthy and offensive to the smell, as to be unfit to drink or use in cooking or in washing clothes, or bathing.

In support of these exceptions of the master in his eighth finding of fact, the city submits the substance of the following testimony.

First. That of JOHN SEAY, (p. 456 of evidence).

"Was marshal of city 1897–98–99; during that time complaint was made to me about something stinking at the branch at the source of the waterworks. Mr. J. A. Horsley, superintendent of the waterworks, and I went up there and in about fifty yards of the mouth of the inlet pipe where they get their water from, in the stream that runs into the inlet pipe, there was a dead horse. His rump was in the water. He was in a very bad fix; he was rotten. When we pulled him out, the hide and stuff——

I don't remember whether he saw the horse pulled out or
311 not. I think he made the negro do it. I think the complaint was made by somebody, and Mr. Horsley went up there hunting for it; did not know at the time it was up there. I don't think Mr. Horsley knew it was there until that day he went up and hunted for it. The complaint was probably made to Horsley, and me and Mr. Horsley went up there together. I don't know that I knew it my duty to protect the water supply. I knew it my duty to move it as soon as I found it there. It was out of the city limits, probably forty or fifty feet."

J. W. F. LOWREY, witness (pages 464, '5, '6, '7, '8)

"Am mayor of Dawson. I know location waterworks company's plant and surroundings; have seen source of water supply and arrangement by which conducted; where it is appropriated by the company; have examined all the premises up to as far as a spring is designated from which water was to be used to supply the town; Dunn's spring. The branch extends a great way beyond that. The land through which this branch flows and in which the springs are located, above the waterworks company, is a dark, murky, muddy swamp; and the contamination of the land, especially on the west side is situated so that all the washings from six to eight residences and the other houses, are necessarily thrown into this branch. That drainage is now contaminated by the surface washings from privies, horse lots and the butcher pen. The driftings from these places all run into this branch. The whole swamp is very largely covered with vegetable matter, especially above Dunn's spring. Nothing whatever has been done by the waterworks company to protect this spring or their outlets or this branch above the mouth of the inlet pipe which leads into their waterworks; and as
— nothing in the way of protection to prevent the flowing of
the surface waters from these settlements I have spoken
312 of along the whole side on the west, into these springs and other branches and the main branch above the inlet pipe, it is an absolute fact that all this water does flow into that place. I

have had in my family as much experience with this water of the company as is possible for my family to have, I suppose; have had the water in my house and yard since the beginning. The water has varied. In dry weather the water is clear and apparently fit for use, and but for the fact that we know the contaminated sources from which it came, we might use it for drinking purposes. I have never used it for that purpose because of the source from which it is brought. Sometimes it is very nice for bathing and sometimes it is wholly unfit for bathing. It is permeated with mud, as red as mud can make water by flowing into it; I could not tell what proportion of time. I know this: We have not had any rain here of any conseqence in eight or ten days, and the water has not cleared up from it yet. I have tried to use the water for bathing purposes; generally use it in bath tubs. I have on several occasions filled the bath tub with water and it was so bad I could not use it; let it out again. Used it almost every week for bathing purposes. It is very objectionable, still we have no other source from which to get bathing water. It is not at all fit, I think, for laundry purposes; never heard of anybody using it for that. Hardly fit for cooking purposes; still we used it for that; boiled it; by that means we hope to destroy the germs, disease producing germs, that might be in it. We used it for that because it is so inconvenient to get other water. Some have built an artesian well in our neighborhood because of the fact that it is unfit for use for drinking. The neighbors joined in and dug an artesian well. This has been done by two or three others in town that I know of; maybe three.

313 A. M. RAINES, witness. (Pages 483 to 487 inclusive)

"I know Adams' butcher pen testified about. It is located 200 yards, to the best of my judgment, above the inlet pipe they get their water from. The drainage from this butcher pen flows into the branch the water company gets its water supply from. This butcher pen has been used almost continuously for the last three or four years. The cattle that are butchered are kept right there. The offal is thrown down there on the ground; from where the drainage goes into the branch that the water company get their supply from. The butcher pen is for the public market. I have a farm beyond this butcher pen and I go backward and forward to that farm and have seen beeves butchered there on various occasions. I have used the water of the company since 1898. It has been very muddy and filthy at various times. Sometimes it would stink. We have never drank the water at all; have been afraid to drink it. We tote water from the artesian well to drink; cook with this water sometimes. The time it got to stinking so bad we quit using it for drinking purposes. Where this butcher pen is located is on private property of Mr. Adams and outside of the city limits.

R. J. SEWN, witness (pages 487 to 491)

"Am butcher. Butchered out here at Mr. Adams' four months year before last; know where waterworks station is; the butcher pen is on the hill about 300 yards above the station. Year before last during four months I butchered out there, sometimes three cows a day; sometimes one every day; left the offal there; hogs got some of it; don't know what went with balance; suppose the buzzards got it; saw buzzards there. By offal I mean the entrails of the animals and contents. Don't know of any occasion when the
314 offal was taken away. The surface water from there went into the branch that supplied the waterworks. I have seen cows butchered there this year since Christmas. Some days I wouldn't kill any cattle out there at all; some days would kill one; some days four or five; three or four. Didn't keep the place clean; offal left there on the ground; Adams had hogs there; they had access; Adams' house about 300 yards.

R. F. SIMMONS, witness (pages 478–80)

"Know pumping station waterworks company and where they get the water from; know the creek well; know there is a butcher pen two or three hundred yards above; northwest; above waterworks station two or three hundred yards. I don't know any way the water could go from there except towards the creek; I know the butcher pen has been used; have seen them butchering several times; they throw the offal to the hogs; have seen them eating it; that butcher pen has been there two or three years, maybe more. Adams kept the market here in town and supplied the town to some extent. I think the butchering has been going on there two or three years."

W. F. LOCKE, witness (pages 496–97–98).

"Have been using water of waterworks company seven or eight years. Used it possibly two weeks for drinking purposes two or three years ago. Later I got the boy to bring us water from the pump in the business part of the town. Bought a filter and used the water of the waterworks company for ten days or two weeks, and quit using it on account of the filth that had accumulated in the filter. At times the water is muddy and unfit for use. On one or two occasions odor was so bad would not use it for drinking purposes but had water brought from well; that was about four years ago; think I have used the water since 1894. Have not
315 noticed any offensive odor for the past year or two. I noticed once or twice the first year I moved around where I am now living. I detected offensive odor more than once or twice. Two occasions I refused to bathe in the water because of the offensive odor; possibly noticed it four or five times; don't think that that was when the water was very muddy; don't remember whether the water was very low; don't know what caused the offensive odor,

but don't think it was mud; never used it for drinking purposes except the two weeks I spoke of.

316 WALTER CHRISTY, witness (pages 499–500–1)

"Living here about twelve years; know property of waterworks company; well acquainted with the surroundings, and the creek and the spring up there; I lived out there at my grandmother's a year; '90 or '91; since then have visited up there frequently, constantly. There are some houses on the hillside on the west, and a butcher pen about 150 yards from the stream up there that supplied the waterworks. Mr. Adams did the butchering there for two or three years back. I understand he used it in December of last year. He used it for butchering cattle; I have been there and seen him butchering a good many times; I suppose 30 or 40 times during the last two years. *Of* offal and excrement from the cattle is left on the ground for the hogs; don't know that they always consumed it. In case of rain the surface water from where the offal was thrown, where this butcher pen is located, goes into this branch, from which the pumping station gets their water. No other source for it to go to. Don't know whether they are using the butcher pen now or not; have not been there since February or March. Sometimes there would be more offal than at others; sometimes two cattle; that is as much as I have seen at one time. Have seen offal there when fresh and when it had been there for some time; about 100 yards from the creek; never measured it. I know it is on the hillside, and there is no other way for the water to go except into that stream. Where the cattle is butchered there is a slope towards the branch. The ditch goes from the pond into the creek. From the butcher pen it does not drain into the pond. The pond is back in another direction. The pond is dry most of the time. The ditch from the pond runs into the branch.

317 Dr. L. C. GONEKE, (pages 530–1–2–3)

"Practicing physician eighteen years; lived in Dawson twelve years. Have been using the water of the waterworks company ever since but until last two months. Drank it for a short while; used it after that for irrigating garden, yard, and for bath tub, kitchen, watering stock, etc.; could not use it as drinking water; caused indigestion. Wife and I quit using it on that account. Used it for bathing purposes. At times it would not be used at all. Entirely too muddy and had an offensive odor. Quite a number of times this was the case during my experince with it after rains. I attributed it to the effect of rain on the water. Peculiar offensive odor when I turned it on in bath tub; didn't use it at all; impossible to say how many times; quite a number in my experience. About as definite as I can be, I suppose about six or eight times in one month and once in two or three months. I attributed it to the rains. In dry weather water was very clear and very good for stock uses and bathing purposes. Could not use it as much as I needed

for irrigating purposes. At that time I was notified to hold up on it, by Mr. Horsley the superintendent. That was the time when I appeared to need it particularly for irrigating; paid for it during the winter when I had no use for it. I state as a physician, having used this water and having had experience with it, I consider it very unwholesome. Not speaking as a physician, I consider it good for bathing purposes except at times when it became muddy. I consider it good for cooking purposes as soon as it was boiled. Quite a number of times I could not use it for irrigating purposes, in the summer when it was very dry; could not tell what year; near mid-summer. I could not tell you to save my life what year,
only from being put on notice several times during my ex-
318 perience with the water. Not the same summer; three or
four summers. They have been every summer I use it; I cannot be positive about the number of summers. Quite a number of times; six or eight times; something like that; don't think all one year or season. When I was notified to that effect it was during exceptionally dry times in summer.

J. S. LOWREY, (pages 545–6)

"Have lived in Dawson twenty-five years; in '92 lived on Main street; had water pipe run in rear door to be used for cooking purposes; tried to use it for cooking purposes and could not; muddy and had a bad odor in '92, in the spring and summer. We cut it off then and since I have been living on Lee street and tried it again this summer; tried it last year. Got it in my yard and every once in a while I try it; same trouble was the result last year and the same trouble this year; has red color to it and is offensive. Was a member of council in '94. Made no complaint officially; made no complaint personally or request for improvement. I quit it.

Dr. A. R. LAMAR, witness, (pages 547–8–9)

"Physician eight years; been living in Terrell all that time; Dawson two years and a half or more. Have had experience with the water of the Dawson Waterworks Company; have been using it for irrigating garden and in barn; have used it part of the time for cooking purposes and in the bath room; did not use it for drinking purposes; found it was bad; had an odor that was offensive. I also saw if you draw it from the hydrant and let it stay over night in the pitcher it would have an odor about it; would have an odor most of the time after setting awhile. I considered it unwholesome, so much I did not drink it. It was all right for cooking purposes
if boiled. Have never used it for drinking purposes when I
319 could get any other; been using artesian water from town
pump. What I say about this water is based on actual test, so far as drinking. I have noticed it is offensive; very often. If you draw it out of the hydrant and let it stand over night in bucket or pitcher, it will always have a bad odor. I have let it stay over

night in a bucket or pitcher to see, about 365 days in a year. It is not always offensive in the morning, but nearly always so. Running water, as I understand it, purifies itself by coming in contact with the air, and standing water, especially if there is any nitrogenous matter in it, putrifies. My idea is that standing all night in a pitcher, it putrifies. If the water was pure I would not expect it to putrify. I mean by nitrogenous, matter in it; vegetable and animal matter; inorganic; that causes the putrifaction.

CHAS. DEUBLER, witness (pages 550–)

"Live right across the street from new tank, top of it is open; of the old one was covered. I have seen buzzards roosting on the new standpipe at different times in the day time; as many as six there at one time. It has been so within the last two weeks. You can see them there most any time in the day as many as one, roosting there, as far back as directly after it was built. It is a roosting place for buzzards; they roost awhile, then sail off, and another will come."

A. J. BALDWIN, (pages 493–4–5)

"The school here in our present condition is supplied with artesian well water; has been for five years, because the board and teachers at that time considered the waterworks water as unfit for use in the school. I am a member of the board. I was at the time of the meeting and acquiesced in it; the board acquiesced in
320 it. I think it was on the recommendation of the superintendent and the complaints of the people and teachers at that time. It was verbally condemned by the concurrent action of the committee. Had to pay $5.00 a month to have water hauled to the school. Had water connected at the school with the city water, I think soon after the waterworks were put in. They have kept it there all the time until three or four years ago.

J. A. HORSLEY, supt., witness for complainant. (Pages 569–70–1–4–5)

"I reported the dead horse to the chief of police, because I knew it was wrong to let it stay there; people getting water from that stream. As soon as I discovered it was up there, I went to the chief of police at once. For eight or nine months I spent much of my time in the engine house where the water is pumped. I have spent my other time around on the streets about in different places; I go down and inspect things occasionally as superintendent. I don't stay there regularly. I don't stay at the stand pipe regularly. I stay about on the streets engaged in other business; real estate and life insurance. Don't know whose horse it was that died in the branch; understood it was a negro's. Did not know he was there before he died. (Page 135) Occasionally the people told me the water was muddy, unfit for use, smelled badly, and pressure was insufficient, for instance on these water ends, and asked me to flush

mains so the water would clear, and I did it. During that time I remember complaints made several times about pressure. My recollection of first complaint, Whitehard and Green fire, '97. Have seen buzzards in tank in day.

321 F. A. RUGGLES, witness for complainant (page 79)

"I removed the timbers of the old tank when it was torn down and ordered to construct a new one. There was at that time in the bottom of said old tank, four inches in depth of foul and muddy sediment."

The city in support of this same exception refers to the affidavit of George Callaway, employé of waterworks company, filed by consent of master and counsel on both sides of the case as evidence in the case May 29th, 1902, and another of the same witness June 3, 1902, and after the examination of the other witnesses orally, proving the discovery in the water tower of the waterworks company of three dead and decaying buzzards in May 1902.

The city submits that it refrains from encumbering the record in briefing all of the testimony to the same effect as the above, inasmuch as the same was not contradicted to any extent in any material particular; and inasmuch as the master himself has found informally but in effect, that the water was not kept in a condition suitable for the purposes intended.

322 Seventy-eighth. The court erred in said decree in overruling the fourth finding of fact of this defendant, which was as follows:

The city says that the master erred in not finding as a matter of fact that the water supplied to the citizens of Dawson from the 1st of January, '96, and up to the time of the filing of his report, was not suitable for domestic, sanitary and other useful purposes.

In support of this exception of fact, the city refers to the evidence briefed in support of exception of fact No. 3, in order to avoid repetition, with the statement that the said testimony is not contradicted to any extent in any material particular.

Seventy-ninth. The court erred in said decree in overruling the fifth finding of fact of this defendant, which was as follows:

The city says that the master erred in finding that excepting on rare occasions the reservoir was kept supplied with water sufficient to produce the required pressure and should have found as a matter of fact in his report that the waterworks company had not performed its contract as to pressure; that its service had not been adequate or reliable to the extent required by its contract, because these facts had been established by the testimony, and the master erred in fact in not so finding.

In support of this exception the city briefs the evidence as follows:

323 W. R. BALDWIN, (pages 337–8)

"When the cap was taken off the plug at the kiln fire water would not come out at first, but solid, soft mud. I suppose a half minute; might not have been so long before the water came commenced coming mud. I saw the mud come out and I stopped and looked at it. The hose was two or three feet from it when the mud came. By the time the hose got there I suppose one third water came and the rest mud. When it first came out it was solid, soft mud. It was coming out of the end of the hydrant. It was on Main street about 100 yards from the public square. It was on the principal street in the city, about a block from the business center."

A. J. BALDWIN, (pages 353–4–5)

"After the three houses burned at Green and Whitehard fire, 1897, a day or two, Mr. Horsley told me they were going to make a test and I went with him. He took 100 feet of new hose furnished by him and went over there and attached it to the plug in front of Mr. Melton's, the same plug that played on these buildings of Green and Whitehard. Had two sections of hose, fifty feet each, new, attached to the plug, a one inch nozzle, and the water barely went above the electric light pole. It was turned on full. It went not exceeding five feet above the pole. The pole was 25 feet high. The height of the water did not exceed thirty feet. The air was still enough to make a straight stream; ordinary condition of air; no interference with stream by wind. This was in 1897. No change had been made in the waterworks from '94 up to this time, that I know of, and none from the date of that test up to the time the new tank was built. The Green and Whitehard houses were burned up.

324 I remember the Grier and McClellan fires in '98 on Lee street. The distance from the plug to the building there was 80 feet, and the house sets inside some 25 feet. 100 feet, I would say, from the plug, excepting the width of the side walk. There was no unnecessary amount of hose. There was only one line of hose from the plug.

J. G. DEAN, (page 393)

"The old tank from the ground to the bottom of the tank was 59 feet and 7 inches. Mr. Baldwin and I measured it. For several years before it was torn down it leaked badly; never possible to fill it entirely, at least for several years before it was torn down. Might possibly by pumping all the time get it full. During these years it was not generally kept full; it leaked so badly; it was possibly kept two-thirds or about three-fourths full. The present tank is forty feet higher than the other.

Dr. W. B. CHEATHAM, (pages 415–16–17–18–19–20–21).

During '96–97–99, I think twice, I can remember no more positively than that, I found the standpipe empty; one time in the day and the other time at night. I tried to draw some water in my bath

tub, is the way I know it was empty. At another time I thought it was frozen. The weather was all right the first time; I think in the spring; not cold water. There was no water in the tank at all; could get no flow. I told Mr. Horsley and he stated to me, I think upon investigation, that this stand pipe was empty. It was empty twice, not on account of any freeze; been stopped up several times by freezes. It was twice I think Mr. Horsley admitted that the pipe was empty. The fault of the engineer or somebody; I don't know who. The last time I found it empty it was between '97 and '99. I can not say what year prior to that
325 time it was. Where I live the surface is lower than the surface at the stand pipe. I investigated all around and the water would not run from my faucet in my house; during '95–6–7–8; the standpipe was rotten and leaked. It was leaking all along. I saw it; a considerable stream would pour out; between the whole body of it; between the staves where they came together; twenty feet from side walk; interfered with passage. Sometimes you would have to go around on the other side of the street to get out of the spray of the water from it. It would wet the sidewalk so it was almost impassable; especially when ladies would walk around it. Horsley admitted to me that the standpipe was in a bad condition, in conversation about six months before this bill was filed. I remember the test on one occasion on College street, of the pressure, very well. Mr. Horsley, the superintendent was present. I was there by accident; passing by to see a patient. They attached the hose, turned on the stream and threw the water twenty or twenty-five feet, or probably thirty feet high. It was some new hose they had; 100 feet. The force of the water was turned on. Mr. Horsley manipulated it. From what I could see the test was made fairely and fully. The air seemed to be pretty still. I noticed that no currents were effecting the stream to blow it one way or the other; seemed to be what you would call still air. The water went from twenty to thirty feet. I noticed the height of it. That was on one of the principal streets of the city.

JOHN SEAY, (pages 444–5)

"I remember the McClellan fire in June '98, very well, but not the date; only one that I remember. I noticed the use of the hose on that occasion; can not exactly give you the length of the hose;
326 can give you the distance of the plug to the fire; don't think there were but three sections of the hose used; don't know what the length of the hose was; some thirty, some fifty feet to a section. It is even 100 feet from the plug to the eaves of the house. I measured that. I do not remember that there was any surplus hose used on that occasion; did not have hold of it myself; I don't think the hose was 100 feet. The water was fully turned on; there was only one line of hose from that plug. It was the size of nozzle used all the time. It was the usual nozzle. I think it was a pretty day; don't think there was any storm concealed; no storm; in my

recollection it was still; the hose was about 20 feet; they got there with the hose but could not get the water on it. We threw the hose up and down trying to make the water go further; hit on top of the house about twenty or twenty-five feet; didn't go on the roof of the house. It did go on the eaves. The water went about twenty or twenty-five feet high; not over twenty-five.

F. M. McNULTY, (pages 459, 60--1--2)

"Lived in Dawson since '81; alderman at one time; remember the McClellan fire very well but not the year. I suppose it was 100 feet from the plug to the McClellan house that was on fire. I think I turned the water on. I turned it on properly. I don't think the hose was over 100 or 150 feet. They didn't have any hose to spare. I don't think there was over 100 feet, though I won't be positive. They had an inch nozzle. The city had an inch nozzle and some three-fourths of an inch. This was the city nozzle. There was not any pressure on this occasion. Threw the water about to the eaves of the house, twelve or fifteen feet from the ground; tried to throw the water and could not; did not have pressure enough; was not force enough behind it. Don't remember any disturbances
327 in the air. This was on one of the principal streets of the city. Got an old door and held it up in front of the men holding the nozzle. Got up to the house as close as they could that way. Couldn't throw the water on top of the house. I remember the test made by Horsley and others in 1897 at Doc. Melton's. I was there, Andrew Baldwin was there, and Mr. Horsley. I remember those two. Had 100 feet of hose; made a full and fair test. Mr. Horsley conducted this. When it was made with the new 100 feet of hose. The air was very calm. It was a one inch nozzle. Horsley turned the water on; threw the water in every way on that occasion; would throw vertically, and the highest it went was 25 or 30 feet.

C. DEUBLER, (pages 505–6–509–510).

"I remember the McClellan fire. Very poor amount of pressure on that occasion; threw the water about 20 or 25 feet. The air was still at the McClellan fire, Parks fire, Green and Whitehard fire, and the dry kiln fire when I was present. I will state from my observation of the way the water was thrown and handled and manipulated on this occasion, that there was not sufficient pressure from the waterworks company to have thrown water through 100 feet of hose, one inch nozzle, in still air, vertically, fifty feet. There was not pressure enough. (The master allowed this testimony over objection after the witness stated his experience with water and fires.) I remember the old tower; lived 75 or 100 yards right across the street in 1895–6–7–8, until it was replaced; it was in a leaky condition. After filling it about half full, further up it leaked; like filling a basket. It leaked all around; shot out in big streams, in some places as big as my hand. Had large streams and small ones all

around the staves, running up and down. When the wind
328 was blowing, the water would reach my porch. Don't think the tank had been filled in several years (p. 511). It could not be.

J. P. ALLEN (pages 534 to 538)

"Acting in capacity of engineer for the waterworks company at the station. Water muddy right smart. It was deficient in quantity; was not enough of it for filling the tank; that was true right smart; had to run the pump slow; been times in which you could not get enough to fill it at all during dry weather. The standpipe in town was very leaky. I would get it full before I would quit; has taken as long as six hours. My instructions were to keep it full in case of fire. I was required to keep it full. It would be hard to do sometimes. Have to keep the pumps going day and night, and then it would not get full, the tank leaked so bad. Sometimes the water was very muddy and sandy when it was dry, on account of the suction. The water was low down and it would suck sand. The sand would finally clog in the well, and would have to pump sand; would cut out the plungers and valves. Water was very druggy when it was low. I did not drink the water. It was not fit to drink. I thought it was unclean. In opening the pumps I noticed an inch of corrosion and mud clean to the well part of the pump. There was a kind of offensive odor like you will find in muddy streams. I thought the inlet pipe should have been cleaned out. I don't know if I did not mention it to Mr. Horsley that there should be made a hole to keep the same out. Would be sucked up through the pump. The pump is what kept that from filling up, I suppose; never was cleaned, to my knowledge. I was employed as engineer for thirty days by Mr. Horsley.
(p. 541)

Cross-examination:

329 Q. It was filled all the time you ran the pumps during that exceptionally dry spell? Just took longer to fill it?
A. Don't think they had sufficient water to fill it; kept running the pumps.

E. J. CAMERON, (pages 551).

"Age 29. Am chief fire department Dawson, have had experience 12 years; from bottom to head of this department; since November' 99 (p. 544). Since present tower have noticed the absence of pressure once that I know of. For twenty minutes, I suppose. I know there was no water in the tower; no water came up here in the engine from spigot. It was six or seven months ago. I immediately notified Mr. Baldwin and Mr. Deubler; thought there might be a burst in the main, or something to cause the leak, or the tank run dry, without their knowing about it. One Saturday morning

I started to washing the wagon and the boy complained there was no water coming out of the faucet. I went and tried the faucet and there was none. Went and tried it again in about twenty minutes and the water was coming in full pressure. I don't know, sir, how long it had been empty.

HORSLEY, supt. W. Co. (p. 130)

"During the summer of 1900, maybe 1899 and 1900, during the very dry season, the pressure went down three or four times, so low there was no pressure. Several times early in the morning it would not run out of the hydrant. It was this way, I suppose, two or three times.

330 Eightieth. The court erred in said decree in overruling the sixth finding of fact of this defendant, which was as follows:

The master erred in his finding of fact as follows: "No complaint concerning the character of the evidence or the amount of pressure was made to the water company until after the institution of the present suit." The city says the contrary was proved by witness for the complainant (Horsley) (See latter party — his testimony as briefed under exception of fact No. 3, page 44. See exceptions.)

Eighty-first. The court erred in said decree in overruling the seventh finding of fact of this defendant, which was as follows:

The master erred in his third finding of fact, that the city had express notice that the bonds were to be issued and sold for the purpose of procuring the money with which to construct the waterworks plant, and that the city acquiesced in this arrangement. Because the evidence showed that this notice was not received until after the contract was made and much of the work done by the waterworks company towards construction, and an extension of time was desired and requested.

Eighty-second. The court erred in said decree in overruling the eighth finding of fact of this defendant, which was as follows:

The master erred in his fourth finding of fact in not finding that prior to the date of the assignment of the cause of action of the complainant, that the water works company only had demanded payment of water rentals and had entire control over the contract.

331 Because the city says that while such was otherwise proven to be the fact, James H. Dawes, superintendent of the waterworks company, a witness for the complainant, also testified (see page 115) "The Dawson Water Works Company had charge of the original litigation and all these demands against the City of Dawson up to the finding of the supreme court of Georgia already referred to."

Eighty-third. The court erred in said decree in overruling the eighth finding of fact of this defendant, which was as follows:

The master erred in his fifteenth finding of fact, because such finding was entirely irrelevant.

Eighty-fourth. The court erred in said decree in overruling the ninth finding of fact of this defendant, which was as follows:

The master erred in finding of fact for the company the right to recover the water rentals and all other relief. Because the evidence not only failed to show that the water works company performed the contract as to pressure or kind of water or otherwise, but the uncontradicted testimony showed quite the contrary.

Wherefore, the City of Dawson prays that each and all of the aforesaid decrees be reversed.

DU PONT GUERRY,
Of Counsel for the City of Dawson.

Filing: Filed in clerk's office 10 day of Oct. 1903.
O. C. FULLER, *Clerk.*

332 STATE OF GEORGIA, }
Terrell County. }

Clerk's office, city council of Dawson, Ga.

I hereby certify that this pamphlet hereto attached and marked "The Code of the City of Dawson," is the code of the city of Dawson now in use and is the only code used by said city, being the last publication of said code.

I further certify that I was regularly elected and sworn in as clerk of the city council of Dawson, Georgia, and am now clerk of said council and as such have the care, custody and control of its records.

In testimony whereof I have hereunto set my hand and affixed my seal of office, at Dawson, Ga., this the 27th day of May, 1899.

[Seal City Council, Dawson, Ga., Clerk's Office.]

L. C. HOYL,
Clerk City Council.

Identified.
W. A. W.

333 & 334 *The Code of the City of Dawson and the Ordinances and Rules for Government of the City Council.*

Erratta.

On page 72, section 226, third line, insert word "or" between words "Dawson" and "in."

On page 55, section 155, insert at end of section, "and not transferable."

On page 52, section 141, in sixteenth line, strike out "*Dawson Journal*," and insert in lieu thereof "in any of the city papers."

On page 52, section 142, in third line, strike out the words "except applications for retail liquor licenses."

335 & 336 *Officers of the City of Dawson for* 1892.

Mayor—W. B. Cheatham.

Councilmen :

W. C. Kendrick,
Wm. Kaigler,
Chas. Deubler,
T. R. Hannah,
Ed. Orr,
E. L. Rainey.
City clerk—J. L. Janes.
City treasurer—F. W. Clark.
City attorney—J. Laing.
Marshal—L. A. Hatcher.

337 *Charter of the City of Dawson.*

An act to establish a new charter for the city of Dawson, and for other purposes.

SECTION 1. *The General Assembly of Georgia do enact*, That from and after the passage of this act the inhabitants of the territory hereinafter designated, are hereby continued corporate by the name and style of the city of Dawson, in the county of Terrell, in this State, and the corporate limits of the said city of Dawson shall extend one mile in every direction from the court house in said city.

SEC. 2. *Be it further enacted by the authority aforesaid*, That the mayor and aldermen of said city, now serving in that capacity, shall remain and continue to exercise their powers and duties as the officers of said city, until their successors are elected and qualified as hereinafter provided.

SEC. 3. *Be it further enacted by the authority aforesaid*, That on the second Wednesday in December next, and annually thereafter, an election shall be held in said city in the council chamber, or court house, for a mayor and five aldermen, and also for a clerk
338 of council and a city treasurer. At said election all male citizens of this State residing within the corporate limits of said city, who shall be entitled to vote for members of the General Assembly of the State, and who have resided within said city for at least thirty days prior to the time of said election, shall be entitled to vote for a mayor and five aldermen of the city council, and for a clerk and treasurer of said city. Any person or persons legally entitled to vote at said election shall be eligible for the position of mayor, alderman, clerk, and city treasurer. Said election shall be presided over by a justice of the peace or ordinary, together with two freeholders of said city, none of whom shall be candidates. And

the elections shall be opened and closed as elections for county officers in this State. And the laws of this State regulating the keeping of tally sheets, list of voters, and disposition of ballots, shall apply to and govern said election. The said managers of said election shall take an oath faithfully to discharge their duties and that they will not divulge how any person at said election may vote. The persons voted for at said elections who receive the highest number of votes cast shall be declared duly elected; and the said managers of said election shall give certificates to that effect, which shall be evidence of their election and authority to assume the functions of their offices. And said certificates shall be recorded by the clerk of the council in the minutes of the said city council, which shall be held and esteemed to be the best evidence of said election. Any person voting at said election, contrary to the provisions of this act, shall be guilty of a misdemeanor, and on conviction shall be punished by a fine not to exceed one thousand dollars, imprisonment in the county jail not to exceed six months, work in the chain-gang, or other public works, not to exceed twelve months, any or more of these, in the discretion of the presiding judge.

SEC. 4. *Be it further enacted*, That on the day succeeding their election (or as soon thereafter as practicable), the persons elected as mayor and aldermen shall meet at the council chamber for the purpose of organization, and each shall take and subscribe before some judicial officer the following oath, viz: "I, A. B., do solemnly
339 swear that I will, to the utmost of my ability, discharge the duties of mayor, or alderman, as the case may be, for the city of Dawson during my continuance in office, so help me God." The mayor after being qualified is empowered to administer the said oath to each of the aldermen. The mayor and aldermen shall hold their offices until their successors are elected and qualified. And in the event that the office of mayor, or any of the board of aldermen, clerk or treasurer, shall become vacant by death, resignation, removal or otherwise, the mayor, or in case his seat is vacant, a majority of the aldermen shall order a new election, notice of said election to be published for four weeks, and the same to be managed according to the provisions of this act. The clerk and treasurer, before entering on the discharge of their duties, shall take an oath before the mayor, or one of the aldermen, to faithfully and promptly *to* perform all and singular, the duties required of them as clerk or treasurer for the city of Dawson, during their continuance in office. They shall each give bond in a sum to be fixed by the mayor and aldermen, payable to the city council, and conditioned for the faithful performance of their duties. The mayor and aldermen shall have power and authority to prescribe the duties of said clerk and treasurer, to fix their compensation and to exercise a supervision over their official conduct. The said clerk and treasurer may be at any time removed from office by the said mayor and aldermen on account of neglect of duty, malpractice or malfeasance in office. In case it shall become necessary to remove said clerk

and treasurer from office, and thereby create a vacancy, then a new election shall be ordered in the manner hereinbefore provided, and the duties of such officer so removed, shall be performed in the meantime by one of the aldermen to be selected by the other members of the board, until such vacancy shall have been filled by an election. Should such vacancy occur not more than thirty days before the time appointed for the regular election to take place in December, then and in that event no election need be had to fill the vacancy, but some member of the board of aldermen shall discharge the duties of the office during the interval. The official term
340 of the clerk and of the treasurer, shall be one year and until their successors are elected and qualified.

SEC. 5. *Be it further enacted*, That the mayor and aldermen shall have power to elect a marshal, deputy marshal or other police officers; also a city physician, and city attorney, if they deem it necessary and proper, and any and all other subordinate officers that they may think the best interests of the city demands, to define their powers and duties and to fix their salaries, to require of them a bond for the faithful performance of their duties and for such amount as the mayor and aldermen may deem proper. The said mayor and aldermen shall have power and authority to appoint a board of health for said city and to define their powers and duties, and to prescribe their compensation. The mayor and aldermen shall have power and authority to remove or discharge from office any officer selected by them on account of malpractice or misfeasance in office, or inability to perform the duties of the same. All of the officers selected by said mayor and council, shall before entering on the discharge of their duties, take and subscribe before the mayor or other judicial officer, an oath to faithfully perform the duties of such office to the best of their skill and knowledge. All such officers shall hold their offices for one year and until their successors are elected and qualified.

SEC. 6. *Be it further enacted*, That the said mayor and aldermen shall have power and authority from time to time, to make, ordain and establish such by-laws, ordinances, rules and regulations, as shall, to them appear necessary and proper for the security, welfare, convenience and interests of said city of Dawson, and the inhabitants thereof and for preserving the health, morals, peace, order and good government of the same and not inconsistent with the constitution and laws of Georgia. All ordinances, rules and regulations heretofore adopted in said city, and now in force, shall continue in operation until the same are repealed, amended or modified by said mayor and aldermen, provided the same are not in conflict with the provisions of this act.

SEC. 7. *Be it further enacted*, That the said mayor and aldermen shall have power and authority to levy and collect by exe-
341 cution, or other legal process, taxes within the corporate limits of said city, upon all property, real and personal, liable to be taxed for State and county purposes, provided the rate of taxa-

tion shall not exceed one per cent. upon said taxable property. And the said mayor and aldermen are hereby empowered to require any person, firm, company, corporation, or agent thereof, engaged in prosecuting, or carrying on, or that may engage in, prosecute or carry on any trade, business, calling, avocation or profession within the corporate limits of said city to register their names, business, calling, vocation or profession, and to pay for such registration, and for license to engage in, prosecute or carry on such business, calling or profession aforesaid, not exceeding twenty-five dollars per annum.

SEC. 8. *Be it further enacted*, That the mayor shall have power and authority to issue executions for the collection of all taxes or fines due to said city, which executions shall have the same force and virtue as other like executions. All executions issued shall be signed by the mayor and countersigned by the clerk, and the marshal or deputy marshal shall have power and it is made his duty to levy all executions so issued on any property, real or personal, subject to said execution and bring the same to sale for the satisfaction of said execution and to make titles to the same, and put the purchasers in possession after the same manner as sheriff's sales are conducted. Whenever any land is sold by virtue of a tax execution issued as aforesaid, the same may be redeemed under the terms and in the manner prescribed by law for the redemption of land sold by virtue of tax executions issued by the tax collectors of this State. Whenever there is not sufficient property in the city of Dawson to satisfy any execution issued as aforesaid, it may be lawful to have such execution levied on any property of the defendant in execution within this State; and the levy shall be made by the sheriff or any constable of the county where the property may be situated, such levy to be made by a sheriff or constable as the amount of the execution may indicate, all executions for over one hundred dollars to be levied by the sheriff, and after the levy of such execution by the sheriff or constable, as the case may be, all sub-
342 sequent proceedings shall be conducted as in cases of levying other executions under existing laws at the time such levy is made.

SEC. 9. *Be it further enacted*, That all taxes and assessments due the city of Dawson, shall rank as debts due to the State, whether in the administration of a decedent or otherwise; and tax executions in favor of said city shall have the same lien on property of the defendant anywhere in the State, as tax executions in favor of the State and county have.

SEC. 10. *Be it further enacted*, That the said mayor and aldermen shall have the sole and exclusive right to grant license to sell or retail all spirituous, vinous, malt or intoxicating liquors within the limits of the said city, and of fixing the rate and amount of such licenses, said amount not to exceed five hundred dollars per annum, and the terms and conditions upon which they shall issue, and to declare said licenses void when said terms and conditions are not complied with, and to punish any person who may violate the same.

SEC. 11. *Be it further enacted*, That the mayor and aldermen shall have power to license, regulate and control all billiard and pool tables, ten-pin alleys, or alley of any kind, and all sporting devices within said city, and to license and regulate all livery stables, drays, wagons, carts, or other vehicles operated for hire. And the mayor and aldermen shall have supervision of wells, pumps, fire companies, and engines in said city. The said mayor and aldermen shall have power and authority to regulate and control the conduct of all peddlers and itinerant traders within said city by taxation or otherwise, and also to tax theatrical performances, exhibitions and shows of any kind in said city, except such peddlers, traders and shows as may be exempt under the laws of this State.

SEC. 12. *Be it further enacted*, That the mayor and aldermen shall have control and jurisdiction of all the streets and sidewalks in said city, and they shall have power and authority to compel all persons who have resided in said city for as long as thirty days and who shall be subject to road duty, under the laws of the State, to
343 work on the public streets of said city, but not for more than fifteen days in each year. *Provided*, That any person subject to work on the streets aforesaid may commute the service so required by paying to the city such sum as the mayor and aldermen may prescribe, not to exceed the sum of five dollars.

SEC. 13. *Be it further enacted*, That said mayor and aldermen shall have power and authority to impose and inflict such fines, penalties and forfeitures, for violations of the ordinances by-laws, rules and regulations of the city as shall in their judgment be conducive to the interests, good order and government of said city. *Provided*, That no fine or forfeiture shall exceed one hundred dollars and no imprisonment shall be longer than sixty days; and the offender may be imprisoned in the guardhouse or made to do public work on the streets of said city. Said mayor and aldermen are hereby empowered to establish a city chain-gang to be controlled under their supervision, and all persons convicted or sentenced for a violation of the ordinances of said city may be compelled by the sentence of the mayor or mayor and aldermen to work in said chain-gang on the public walks and streets of said city not longer than sixty days. Said mayor and aldermen shall have power and authority to take from any person charged with the violation of any of the ordinances, rules and by-laws of said city, a bond for his or her appearance before said mayor and aldermen to answer such charge, and in case of a breach of the condition of such bond, the same may be forfeited by *scire facias* to be issued and signed by the mayor and clerk of the city council and returnable to a regular meeting of said mayor and aldermen. Said *scire facias* shall be served on the principal in said bond and his sureties, at least twenty days before the meeting of the city council to which said *scire facias* is returnable, and should no sufficient cause be shown, then said bond shall be declared forfeited by the judgment of the mayor and execution may issue for the amount of said forfeited bond and costs of the pro-

ceeding, said execution to be signed by the mayor and countersigned by the clerk and shall be collected and enforced in the same manner as tax execution, issued in said city, except that
344 there shall be no right of redemption of property sold by virtue of said execution.

SEC. 14. *Be it further enacted*, That said mayor and each alderman shall be vested with the authority and power of a justice of the peace, so as to enable them to suppress all riots, breaches of the peace and commit for the violations of the penal code of the State within the limits of said city, and to bind over all persons brought before them when the evidence adduced shows that such persons may have violated the criminal laws of this State, or to admit such person to bail if the offense be bailable.

SEC. 15. *Be it further enacted*, That said mayor and aldermen shall have power and authority to appoint three upright and intelligent persons, resident freeholders of said city, as tax assessors, and said assessors, before entering upon the discharge of their duties, shall take and subscribe before the mayor or one of the aldermen, the following oath:

"I, A. B., do solemnly swear that I will diligently, faithfully, and impartially perform all the duties devolving upon me as assessor for the city of Dawson during my term of office, so help me God." It shall be the duty of said assessors to place a true and just valuation on all real estate situated within the limits of said city, liable to taxation and return the same to the mayor and aldermen on or before the first day of August in each year or as soon thereafter as practicable. Should the assessment authorized by this section and made by said assessors be deemed onerous or excessive, the owner, his agent, or legal representative of the owner of such real estate who may dissatisfied with such assessment, shall have the privilege of making complaint to the mayor or aldermen within fifteen days after the date of the report of said assessors; and upon such complaint being made, the assessment complained of shall forthwith be referred to three arbitrators, one to be selected by the party complaining, one to be chosen by the mayor and aldermen, and the third by the two thus chosen. These arbitrators shall be sworn to well and truly investigate the matter referred to them and to make an impartial valuation and assessment of such property about which such complaint is made, and their award shall be made and
345 returned within ten days and shall be conclusive and final. The said city assessors shall each hold their office for the year in which they may be selected and until their successors are selected and qualified. Vacancies may be filled by the mayor and aldermen in like manner as such assessors are first chosen as above herein provided. The said assessors shall receive for their services such compensation as the mayor and aldermen may prescribe.

SEC. 16. *Be it further enacted*, That the mayor of said city shall receive a salary of two hundred dollars per annum, to be paid out of the funds and taxes of said city.

SEC. 17. *Be it further enacted*, That said mayor and aldermen shall have power to prevent the erection of any wooden building or structure within four hundred and four (404) feet of the public square or within the territory lying north of Johnson street, east of Vine street, south of Third avenue, and west of Stonewall street, except in a block where wooden buildings are already erected and are standing at the time the person or persons wishing to erect wooden buildings proposes to do so.

SEC. 18. *Be it further enacted*, That said mayor and aldermen shall have power and authority to provide for the registration of all voters in said city. And to this end they may cause the clerk of the council to keep a book to be called a registration book, in which all persons entitled to vote for officers of said city, shall cause their names to be registered ten days before each election, which book shall be closed ten days before such election. No person shall be entitled to vote at said election unless his name be found in said registration book, which book shall remain open all the time, except ten days prior to said election. In any case the said clerk shall administer an oath to the applicant touching his right to be registered and may, if he believes it to be absolutely necessary, require the evidence of one or more credible persons, that such applicant is legally entitled to be registered. If any person shall wilfully swear falsely as to his right to be registered such person so offending shall be guilty of the offense of false swearing and on conviction shall be punished by imprisonment in the penitentiary of this State for not less than one or more than five years.

346 SEC. 19. *Be it further enacted*, That the mayor and aldermen heretofore referred to shall be known and styled as the city council of Dawson, and by this name may sue and be sued, plead and be impleaded, and do all other acts relating to their corporate capacity.

SEC. 20. *Be it further enacted*, That all laws and parts of laws in conflict with this act be, and the same are hereby repealed. And henceforth this act shall constitute the charter of the city of Dawson, in the county of Terrell.

L. F. GARRARD,
Speaker House of Representatives.

M. S. HARDIN,
Clerk House Representatives.

JAMES S. BOYNTON,
President Senate.

WM. A. HARRIS,
Secretary Senate.

Approved September 21st, 1883.

HENRY D. McDANIEL, *Governor.*

Office secretary of state.

ATLANTA, GA., *October* 1, 1883.

I hereby certify that the above and foregoing nineteen pages contain a correct copy of the original act on file in this office.

Given under my hand and official seal.

[SEAL.] N. C. BARNETT,
Secretary of State.

347 *Amendments to Original Charter, City of Dawson.*

CHAPTER II.

An act to alter and amend an act approved September 21, 1883, entitled An act "to establish a new charter for the city of Dawson, and for other purposes," by striking out section 17 of said act and inserting in lieu thereof a new section, to be known as section 17, extending the fire limits of said city of Dawson and conferring additional powers on the mayor and aldermen of said city in regard to the removal of wooden buildings within such fire limits, and for other purposes.

SECTION 21. *Be it enacted by the General Assembly of Georgia*, That from and after the passage of this act, the above recited act be, and the same is hereby altered and amended by striking therefrom section 17 and inserting in lieu thereof the following, to be known as "section 17" of the charter of said city of Dawson: "Be it further enacted, that no wooden building or structure shall be erected in said city of Dawson within the territory lying north of Second avenue, east of Vine street, south of Fourth avenue, and west of Stonewall street, or fronting on any portion of Lee street west of Orange street, or fronting on either side of Stonewall between Lee and Johnson streets, except with the unanimous consent of the mayor and aldermen of said city of Dawson. Said mayor and aldermen shall have power and authority, whenever it shall be by them deemed necessary to the security, welfare, convenience and interest of said city of Dawson, to remove any wooden building or
348 buildings now standing or hereafter to be erected within the limits provided in this section; *provided*, that said mayor and aldermen shall first tender just compensation to the parties to be injured for the property to be removed. The said mayor and aldermen shall have power to pass any and all ordinances necessary to carry into effect the provisions of this section.

SEC. 22. *Be it further enacted*, That all laws and parts of laws in conflict with this act be, and the same are hereby repealed.

Approved October 24th, 1887.

CHAPTER III.

An act to amend the charter of the city of Dawson, so as to increase the number of aldermen from five to six members, and to change their term of office; also to provide compensation for such aldermen and to increase the salary of the mayor, and for other purposes.

SECTION 23. *Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same,* That from and after the passage of this act the charter of the city of Dawson (found on pages 404, 405, 406, 407, 408, 409 and 410 of the "Georgia Laws for 1882–3," said charter having been granted by an act of the General Assembly, approved September 21, 1883), be and the same is hereby amended by striking out of the third (3d) section, after the enacting clause, the first two sentences and inserting in lieu thereof the following: "That on the second Wednesday in December next an election shall be held in said city, in the council chamber or court house, for a mayor and six (6) aldermen, and also for a clerk of council and a city treasurer. Of the six aldermen so elected, three shall hold their offices for a term of one year, and three for a term of two years, and until their successors are elected and qualified; and said six aldermen shall determine by lot which of their number shall serve for one year and which shall serve for two years, and the result of such determination shall be entered on the minutes of the city council by the clerk, so that it may officially appear who are the three aldermen that will serve for one year and who for two years. At all subsequent elections there shall be elected a mayor, whose term of office shall be one year, and three aldermen, said aldermen to serve for two years,
349 and also a clerk of council and city treasurer, their terms to be for one year, and such election to be held on the second Wednesday in December in each year, and to be in the council chamber or court house. At the first and all subsequent elections held under this act, all male citizens of this State residing within the corporate limits of said city who shall be entitled to vote for members of the General Assembly of this State, and who have resided within said city for at least thirty days prior to the time of said election, shall be entitled to vote at said election." The remaining portion of said third section shall continue of force and effect as it existed prior to the foregoing amendment.

SEC. 24. *Be it further enacted by the authority aforesaid,* That the sixteenth (16th) section of said charter, as found on page 409 of the published acts of the General Assembly of Georgia for the session of 1882–3, be amended by striking out of said section the words "two hundred," and inserting in lieu thereof the words "five hundred," so that hereafter the mayor shall receive an annual salary of five hundred dollars; and also that said sixteenth section be further amended

by adding at the end thereof the following: "The aldermen of said city shall each receive the sum of fifty dollars per annum for their services, said amount to be paid in the same manner as the salary of the mayor.

SEC. 25. *Be it further enacted by the authority aforesaid*, That all laws and parts of laws conflicting with this act be, and are hereby repealed.

Approved September 1, 1891.

350 *Rules for Government of Council.*

1. Meetings of city council shall be held regularly on the first Monday night of each month, and at such hour as the mayor and council shall direct unless otherwise ordered by the council. Special meetings may be called by the mayor, for transaction of such business as may require immediate action for the good of the city government; of which meeting- the marshal of the city, shall in person or through a policeman give notice to each and every member of the council.

2. The mayor and three members of the council, or in the absence of the mayor, four members of the council shall constitute a quorum for the transaction of business.

3. The mayor when present shall preside at the meetings of council, preserve order and decorum, and shall appoint all committees, unless the council shall direct otherwise, in which case they shall be appointed by ballot, and the first named shall be the chairman thereof.

4. In the absence of the mayor, the mayor *pro tem.* shall preside and in the absence of both, a chairman shall be appointed by the council, vested with all the powers and immunities in the discharge of his duties of the mayor during the continuance of the meeting.

5. The following order shall be observed in the transaction of business by the council at its meetings, but may be suspended by a two-thirds vote of the council:

1. Reading the minutes.
351 2. Unfinished business.
3. Report of committees.
4. Report of officers.
5. New business.
6. Adjournment.

6. At the commencement of each regular meeting the clerk of council shall read the minutes of the last regular meeting with the minutes of intervening called meetings, and if found correct they shall be approved and signed by the mayor or presiding officer of said meeting.

7. All questions shall be put by the mayor or by the member presiding at such meeting. The members shall vote *viva voce*, majorities determining all questions, unless otherwise provided.

The mayor or presiding officer may at discretion call any member of the council to the chair to allow him to address the council or to make a motion.

8. Whenever it shall be required by any one or more of the members of the council, the yeas and nays shall be called and the vote recorded upon the minutes of the clerk.

9. All elections of officers of city council shall be by ballot and not otherwise.

10. All reports and resolutions, unless for adjournment, shall be in writing. A motion to adjourn is always in order.

11. Each member desiring to address the council shall rise and address the mayor or member presiding. No interruption shall be permitted while a member is addressing the council on such matters as may be before the council, except for explanation, and by special leave of the mayor or member presiding.

12. The mayor or member presiding shall decide all questions of order, but any member dissatisfied with such decision may appeal from his decision to the council, two-thirds of whom voting therefor may overrule said decision.

13. For non attendance or neglect of duty, any officer or member of the council shall be fined as the mayor and council or a majority of them, may assess and determine.

14. Petitions or other communications to the council must be in writing, signed by the parties petitioning, and in all cases
352 must be referred to the proper committee of the council, who shall report thereon, before any action is taken, unless the council shall by a two-thirds vote otherwise order.

15. New ordinances or motions to amend existing ordinances, after the passage of this code shall be read to the city council at the meeting when it is offered, but in no case shall action be taken thereon, except by a unanimous vote of the council voting an urgency in said matter. At the next or any subsequent meeting of the council the said ordinance or amendment shall be again read and be subject to such revision or alteration as the council may deem proper, amendments and alterations to be in writing and submitted before vote is taken on its passage.

16. The vote on all ordinances and amendments shall be taken on each section separately, and after the adoption of the sections separately, the vote shall be taken upon the entire ordinance put upon its passage. Every ordinance of a public or general character shall be published in each case, and in such manner as the council shall deem proper, so as to give notice to the citizens and others interested therein.

17. Before the minutes of any preceding meeting are confirmed and approved, any member of the council may move to reconsider any question, motion order or resolution, or other matter or thing in the minutes of such preceding meeting, and if such reconsideration be voted by a majority of the members present, the subject

matter of such reconsideration shall be the first business in order to be disposed of.

18. These rules shall be binding on the council, and may be altered or amended only by motion submitted in writing at a meeting previous to the one on which the vote on such motion is taken.

19. Fines for non-attendance upon the meetings of the council shall be fifty cents for each failure to attend, and the forfeitures imposed for misconduct of a member while in session shall be one dollar, and the fund arising from said fine and forfeitures shall be kept separate from all other funds belonging to said city and shall be disbursed by order of the council.

353 *Rules for the Government of the Marshal and Police Force When on Duty.*

1. The duty of the marshal and policeman when on duty, is to interfere in all cases where he has good reason to apprehend that a personal difficulty is pending, or a breach of the peace is likely to occur.

2. The marshal and policeman are required to be polite and attentive to all persons of any class or rank who may claim or ask their assistance or protection. Insolence or incivility to any person by either or any of said officers will not be tolerated.

3. The city marshal and policeman when on duty as such officers shall wear upon their persons, in a conspicuous place, their badge of office, and either the marshal or policeman appearing on duty without their badge of office, or appearing with the badge while off duty, are subject to be dealt with in the discretion of the mayor and council. They shall receipt the clerk of the city council for the badge of their office, and when discharged therefrom, or the office discontinued, shall deliver the same to the said clerk and take up the receipt therefor; and in case the badge of office is lost, then twice the cost price of the same shall be deducted out of the wages of the officer losing the same.

4. The marshal or policeman who appears before the mayor to testify or give evidence against any violator of the city ordinances, will confine himself strictly to the case before the court and in which he is called upon to give evidence, and not refer to any former conviction, trial or acquittal, unless called upon by the mayor to
354 state in reference thereto.

5. In all cases of fire or fire alarms, the city marshal and policeman shall give the alarm by ringing the fire bell, and using their best efforts to direct the fire companies and the citizens to the locality of the fire.

6. The marshal or policeman found guilty of indulging in vulger, obscene or profane language, while on duty, shall be dealt with by the mayor and city council, and shall be subject to reprimand, fine or expulsion from office, in their discretion.

7. The city marshal and policeman shall keep sober, and any one of them found to be in a state of intoxication while on duty, shall be dealt with by the mayor and city council, and reprimanded, fined or discharged from office, in the discretion of said mayor and council.

8. The city marshal and policeman are required to arrest any and all persons who may be guilty of drunkenness or any disorderly conduct on the streets, and imprison such offenders in the city guard-house until such time as they can be brought before the mayor's court to be dealt with.

9. The city marshal and policeman when on duty shall disperse or quiet all noisy or tumultuous assemblies on the streets or in the public halls of the city. Nor shall they allow, at any time, the streets or sidewalks to be blockaded by persons or vehicles.

10. They shall arrest any and all parties for fighting, or boisterous cursing, or quarreling on the streets, and shall maintain order, peace and quiet at all times when on duty; and they are hereby strictly prohibited from using their clubs or pistols, except in urgent cases of self-defense.

11. The city marshal and policeman when on duty may stop, search and detain any wagon, cart, or other vehicle, in or upon which there shall be good reasons to suspect that anything stolen or unlawfully obtained may be found; and also to arrest and detain any person, or persons, who may be reasonably suspected of having or carrying anything stolen.

12. The city marshal and policeman, shall in all cases of arrest of parties charged with offences against the penal laws of the
355 State, when the facts are known to them, make affidavit of the facts and bring them before the mayor for trial to be dealt with as the law directs by said mayor, who is *ex-officio* justice of the peace.

13. The marshal and policeman shall report all violations of the laws and ordinances of the city that come within their knowledge, by information or otherwise, to the mayor, and in his absence to the mayor *pro tem.*, and as speedily as possible b-ing offenders before the mayor for trial.

14. The marshal or policeman when about to examine any suspicious person, or examine any suspicious vehicle, or to make any arrest, shall state his office and in the discharge of his duties, and then execute the duty devolving upon him.

15. The marshal and policeman shall not accept from any person after he may have been discharged, or while he is in custody, or from any of his friends, any reward, nor shall he receive from any person compensation for any damages sustained in the discharge of his duties. Nor shall he receive any other reward than his salary and fees, except by the permission of the mayor.

16. The marshal and policeman shall arrest and bring before the mayor for examination all suspicious persons they may find loitering and hiding about the city after sunset and before sunrise.

17. The marshal and policeman shall in all cases exercise the utmost good faith in all their transactions as such officers, and for any failure to execute the duties of their offices, or for any and all favoritism shown to any person in the discharge of their duties, they shall be subject to be dealt with by the mayor and city council and punished therefor by reprimand, fine or expulsion from office, as may seem just and proper to the mayor and city council.

18. In addition to his salary, provided and allowed by the mayor and city council, the marshal shall receive the following costs, to be paid by the defendants: For each case where the fine does not exceed $5.00, one dollar cost. For each case where the fine
356 exceeds $5.00 and does not exceed $10, two dollars cost. For each case where the fine exceeds $10, three dollars cost. And in no case is the city liable for any of said cost. The marshal shall receive the same commissions out of all moneys collected by him by levy and sale that are allowed sheriffs of this State.

357 *Code of the Ordinances of the City of Dawson.*

ARTICLE I.

CHAPTER IV.

Officers.

SECTION 26. All officers elected by the mayor and city council of Dawson shall be elected at the first regular meeting after their election, and immediately after their qualification.

SEC. 27. All such elections shall be by ballot, and no person shall be eligible to an office in the city except a resident citizen of said city, and of the age of twenty-one years.

SEC. 28. Each of said officers before entering upon the discharge of his duties shall take such an oath and give such bond as shall hereinafter be required of him, and no member of the city council shall be taken as security on such bonds; and the security to any bond or bonds shall be worth the full amount of said bond and the homestead exemption of $1,600 and all his just debts and liabilities, and then to be accepted or rejected in the sound discretion of the mayor. Additional securities or a new bond for an increased amount may be required of any of said officers whenever the council may deem it necessary, and if any officer elect shall fail or refuse to give bond in the first instance, or fail or refuse to give additional security when required, or fail or refuse to give a new
358 bond for an increased amount, with approved securities, his office shall be declared vacant by the mayor of the city, and the council shall proceed to fill the vacancy at such time as they may select, and in the same manner as officers are elected in the first instance by the city council.

SEC. 29. The following officers shall be elected annually, under the provisions of section 1st of this Code: A marshal, and in case it is deemed expedient by the present or any future city council a deputy marshal, and whatever number of policemen as are deemed expedient and necessary for the full and ample protection of the city and its citizens; also a sexton shall be elected and qualified at said time, to take charge of the cemetery in *said city, with such* other officers as the council may deem necessary or proper. All officers so elected shall hold their offices for one year and until their successors are elected and qualified.

SEC. 30. All the officers of said city (not including the mayor and aldermen) shall be qualified by the mayor, or some justice of the peace, and may be fined, removed from office by the council for malpractice, incompetency, habitual intoxication, or inefficiency in the discharge of the duties of their offices; the mayor and city council to be the sole judges in each and all of such cases.

SEC. 31. Balance sheets, reports and accounts may at any time be required of each or any of said officers by the city council, and a failure to make said report or accounting shall be an offence to be tried and passed upon by the council at any regular meeting thereof.

CHAPTER V.

The Mayor.

SEC. 32. The mayor elect, before entering upon the discharge of his duties, shall qualify as provided in the charter of the city. And shall receive as compensation for his services the salary fixed in said charter, and no other compensation shall be allowed him, except upon a vote of an incoming council his city taxes may be remitted.

SEC. 33. The mayor shall have the general supervision and
359 superintendence of the affairs of the city; shall preside at all meetings of the council when present; vote in all elections for officers of said city; provided said voting does not make a tie, and give the casting vote upon all questions in case of a tie. It shall be his duty to see that all laws, ordinances, resolutions and rules of the council are observed and enforced, and that all the officers of said city shall faithfully discharge the duties required of them, and to report at each meeting of the council any default of any officer, and ask that the same be acted upon.

SEC. 34. It shall be the duty of the mayor at the first meeting after his qualification, or as soon thereafter as practicable in each year, to appoint the following, and such other standing committees s the council may direct:

1. Finance.
2. Street.
3. Cemetery.

4. Fire.
5. Water and water supply.
6. Printing.
7. Building.
8. Health.

The standing committees shall each consist of three members, the first named to be the chairman of the committee. They shall carefully inquire into all matters in their jurisdiction, and make such reports and recommendations thereon as they may deem necessary and proper. All such reports shall be subject matter of immediate action of the council.

SEC. 35. The mayor, monthly or quarterly, as he deems proper, may appoint a mayor *pro tem.* who, in the absence of the mayor, shall discharge the duties of mayor by virtue of his appointment. Provided, always, that the mayor *pro tem.* shall be a member of the board of aldermen.

SEC. 36. No additional oath to the oath of a member of council shall be necessary to authorize the said mayor *pro tem.* to act as mayor and discharge the duties of that office, and all acts of the mayor *pro tem.* shall have the same validity and force while exercising the duties of mayor as those of the mayor of the city.

SEC. 37. The mayor shall have full power and authority to hold a court, as hereinafter provided, to be called "the mayor's court," for the trial and punishment of all offenders charged by any officer, citizen, or other person, with a violation of the city ordinances, or to bind over criminals charged with offenses against the penal laws of the State to the superior court of Terrell county for trial, and to return the commitment with the bond, if any be given, to the proper authorities of said county.

SEC. 38. It shall be the duty of the finance committee, not less than once in three months to thoroughly examine the books and check off all vouchers and other evidences of moneys, having been received by the clerk of the city council from any and all sources, and to examine all receipts to him from the treasurer of the city council and report in writing the result of the same to the city council for its action; to examine all bills against the city and approve the same if found correct. It shall be the duty of the finance committee, not less than once in three months, to examine the treasurer's books, and to compute the amount received from any and all sources, and to examine the vouchers for moneys paid out by him, and to require the treasurer to show and produce all balances in hand, and to make written report of such examination to the council, and such report shall be subject matter of immediate consideration by the council.

And it shall be the duty of the finance committee if, upon examination of the clerk's and treasurer's books, and the receipts and disbursements of the moneys of said city by each of said officers; that the said books and vouchers are incorrectly kept, or that any of the money coming into the hands of them, or either of them, is not ac

counted for or furnished and shown to them upon request; the said committee shall then and there prefer written charges against the said clerk or treasurer, or both creating or committing the default, setting forth in full the grounds of the charges; which said charges shall be considered by the mayor and council after ten days' written notice of the time of trial, served by the city marshal or
361 his deputy upon the said offender, and the said mayor and city council shall have full power and authority to discharge said offenders from office if in their judgment the exigencies of the case require it.

SEC. 40. In all cases where an officer of the city council is discharged by said council, the office shall be declared vacant, and the said office filled by an election. After ten days' notice of the time, the election is to be held, by the council or the citizens of said city, as provided in the charter of said city.

SEC. 41. It shall be the duty of the street committee to look after the streets and sidewalks of the city, and to direct the street overseer as to his duties, and to require such repairs put upon the streets and sidewalks of the city as shall make and keep them in good order, and the said street committee shall have control of the street overseer and the hands on said streets, and exercise a general controlling and directing supervision of this department of said city.

SEC. 42. It is the duty of the city council to elect a street overseer and to fix his salary. The street committee shall draw orders on the city treasurer in favor of said street overseer to pay all hands employed by him, and the chairman of said committee shall keep a book containing copies of all orders drawn for said purpose, paid orders to be properly numbered and marked in said book.

SEC. 43. It shall be the further duty of the said street committee to prohibit encroachments upon the streets and sidewalks of said city, and to report all such encroachments by fence palings or otherwise, to the mayor and city council.

SEC. 44. It shall be the duty of the cemetery committee to look after, and direct, and control the sexton in the discharge of his duties, and to direct all repairs and improvements in and about the city cemetery, and to draw orders on the city treasurer for the payment of any amount due for such repairs and improvements. Said orders shall be copied and numbered in a book kept by the chairman of the committee for that purpose.

SEC. 45. It is the duty of the cemetery committee to have the cemetery kept cleaned off and the grounds and fences thereof kept in repair, and they shall apply through their chairman to
362 the chairman of the street committee for the use of the street cart and street hands to do such work and repairs as are needed on said cemetery.

SEC. 46. It shall be the duty of the fire committee to look after and enforce the fire regulations of said city; to control the fire engines and other fire apparatus belonging to said city when not in actual use by the fire company.

SEC. 47. It shall be the duty of the fire committee to take special cognizance and control of flues and chimneys that are defectively constructed within the fire limits, and to compel owners of property to repair, fix and complete flues and chimneys that are dangerous.

SEC. 48. It shall be the duty of the fire committee to prohibit the construction of any wooden building within the fire limits of said city, and to strictly enforce the laws, rules and ordinances of said city in relation to the construction of wooden buildings within said fire limits, and to cite all violators of said laws, rules and ordinances to appear before the mayor of said city to be dealt with as is required by said ordinances, such service to be perfected five days before trial by the city marshal or his deputy.

CHAPTER VI.

The Clerk.

SEC. 49. The clerk of the city council, before entering upon the discharge of his duties as such, shall take and subscribe before the mayor the following oath:

"I, —— ——, do solemnly swear that I will, to the best of my ability, perform the duties of clerk of the council of Dawson without favor or affection. That I will receive and receipt for all moneys belonging to said city, and will promptly pay over to the treasurer of said city council said moneys so collected, and take his receipt for the same, and do and perform all duties required of me by the laws and ordinances of said city to the best of my skill and ability, so help me God." And shall give bond with good
363 security, to be judged of by the mayor, in the sum of fifteen hundred dollars.

SEC. 50. It shall be the duty of the clerk to attend all regular and called meetings of the city council and record all the proceedings of the same in a book to be kept by him for that purpose, and to keep the same properly indexed. He shall keep a book to be called ordinance book, in which he shall plainly record all amendments to city ordinances, and ordinances repealing city ordinances, and keep the same properly indexed. He shall keep also a book to be called a license book, in which he shall record all licenses granted, amount received for the same, when granted, to whom granted, and when same will expire. He shall also keep a ledger book, upon which he shall transcribe all and every entry of any and all amounts of money received by him, with entry of date of receiving amount received, from whom received, and on what account received. He shall keep such other books and records as shall be required by the city council.

SEC. 51. He shall attend upon the mayor's court at each and every sitting, prefer charges and specifications in writing against all parties charged with violating any city ordinance and record thereon the judgment of the mayor in each and every case.

SEC. 52. He must issue all executions, summons, notices, subpenas, and processes of any kind that may be necessary in the enforcement of the rules, regulations and ordinances of the city council. He shall issue all licenses, badges and permits authorized or granted by the city council, and keep a record of the same.

He shall keep an executor's docket, in which he shall enter all executions issued by him, and shall hand said executions to the city marshal and take his receipt for the same, and when returned to him by the marshal, shall enter the return of the marshal on said execution docket, make settlements with the marshal and receipt him for moneys collected on same, and report to the council any failure on his part to collect the same. He shall have at all regular meetings of the council all books kept by him for the inspection of the council.

SEC. 53. He shall receive all moneys due the city for taxes,
364 licenses, fines and forfeitures, and all other sources, and pay the *the* same immediately to the treasurer and take his receipt for the same.

SEC. 54. For any neglect of duty or failure to perform the same punctually and with fidelity, he shall be subject to such penalty as the mayor and council may see proper to inflict (after trial and conviction therefor), not *to* conflict with the charter of said city and the laws and ordinances in pursuance thereof.

SEC. 55. In addition to his salary as clerk of the city council, shall be entitled to the following fee, but in no case shall the city be liable for the same or any part thereof:

For entering a conviction of any person and recording same..	$——
For issuing execution in any case	1 00
For drawing recognizance.....	50
For drawing bond and issuing license.....	1 50
For numbers for drays, each.....	25
For affixing seal of city to any document for any person not at instance of city.....	25
For drawing deed and signing same (to be paid by vender) provided no fee shall be charged if deed presented for signature only.....	50
For each subpena and summons.....	25

CHAPTER VII.

Treasurer.

SEC. 56. The treasurer of the city council shall, before entering upon the duties of his office, take and subscribe before the mayor the following oath:

"I, —— ——, do swear that I will, to the best of my ability, perform the duties of treasurer of the city of Dawson; that I will receive all moneys from the clerk and receipt him for the same, and will safely keep said moneys and pay the same out only upon warrants

drawn upon me by said city council, and do and perform all the duties required of me by the laws and ordinances of said city to the best of my skill and ability, so help me God." And shall
365 give bond with one or more good securities, to be approved of by the mayor, in the sum of fifteen hundred dollars, conditioned for the faithful performance of all his duties as treasurer of the city council of Dawson.

SEC. 57. He shall receive, safely keep, and pay out all moneys belonging to the city, and keep a book in which he shall correctly enter all amounts received by him and all amounts paid out.

All accounts against the city shall be audited by the finance committee, and the treasurer shall pay no money without a warrant for the same duly passed by the council and signed by the mayor, and every such warrant shall be filed by him as a voucher. His books, accounts and vouchers shall, at all times, be open to the mayor and council for inspection. He shall make out and submit to the mayor and council quarterly reports of his receipts and disbursements, and when required, produce at any meeting of the council, regular or called, his books and vouchers to be examined by them.

SEC. 58. For any neglect or failure to perform his duties, or malfeasance in office, he shall be subject to be tried by said mayor and council after ten days' notice of the time of trial, and be punished in the discretion of the council, not in conflict with the charter of the city and these ordinances.

CHAPTER VIII.

Police Force.

SEC. 59. The police force of the city shall consist of the marshal and such number of policemen as the mayor and council see fit to elect for each year, and it shall be in the power of the mayor and council to require each of them, marshal and policemen, to provide himself with such uniform as they may prescribe.

SEC. 60. The marshal, before entering upon the discharge of his duties, shall give bond with one or more good securities, to be approved by the mayor, in the sum of one thousand dollars, payable to the mayor and city council of Dawson and their successors
366 in office, conditioned for the faithful discharge of his duties as marshal and the proper payment of all funds that may come into his hands as such; and shall also take and subscribe the following oath:

"I, —— ——, do swear that I will, to the best of my skill and power, perform all the duties of the office of marshal of the city of Dawson during my term of office without favor or affection, and will account for and pay over to the clerk of council all money of the city that may come into my hands as marshal, so help me God."

Such policemen as may each year, at the first meeting of the city council after installation, be elected to serve during said year, shall

before entering on the discharge of their duties, take and subscribe the following oath before the mayor of said city:

"I, —— ——, do swear that I will, to the best of my skill and power, perform all the duties required of me as policeman of the city of Dawson during my term of office without favor or affection. That I will at all times observe the requirements of the laws and ordinances of said city, so help me God."

SEC. 61. The policemen shall receive such compensation for their services as the council shall provide by ordinance passed at the meeting at which policemen shall be elected.

SEC. 62. It shall be the duty of the marshal and policemen to preserve order in the city, to suppress all affrays and riots, to arrest all drunken, disorderly or boisterous persons who are disturbing the quiet of the city and commit them to the guard house or bring them before the mayor to be dealt with, as the evidence demands; to patrol the city at night; disperse illegal assemblies; report every violation of city ordinances that comes to their knowledge in any way or manner, and to do and perform all acts required of them by any ordinance of council promptly.

SEC. 63. In all cases of inability of the marshal and policemen to suppress disorders, make arrests, or disperse illegal assemblies, they shall have power, and it shall be their duty, to call to their assistance a sufficient number of male citizens of said city capable of bearing arms to aid them in the suppression of riots, dispersing illegal assemblies, or arresting parties for offences. And any citizen failing and refusing to obey the call shall be punished as hereinafter provided.

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SEC. 64. It shall be the duty of the marshal and policemen to serve all notices, summons, subpenas, orders and processes of any and all kinds issued by the mayor, or mayor and council, and execute all warrants issued by the mayor or any member of council, and for such service shall be paid as hereinafter prescribed.

SEC. 65. It shall be the duty of the marshal to direct all officers and persons who may be placed by the mayor, or mayor and council, under him for the preservation of order in the city, and to see that they faithfully discharge their duty, and to report each and every failure at once to the mayor and council, and prefer charges against such offenders in writing.

SEC. 66. It shall be the duty of the marshal to collect all fines, to levy and collect by sale or otherwise all executions placed in his hands by the clerk, and all moneys received from public exhibition, and immediately pay over the same to the clerk and take his receipt for the same, which shall be filed and kept by him as a voucher.

SEC. 67. It shall be the duty of the marshal to attend all meetings of the city council, and every meeting of the mayor's court, and preserve order.

SEC. 68. In the absence or sickness of the marshal, a marshal *pro tem.* may act with the consent of the mayor. Such marshal *pro tem.* shall be a member of the police force, if there be a police force on

duty in said city; otherwise, a citizen of said city, selected by the marshal and appointed by the mayor, and the marshal *pro tem.* shall be subject to all the pains and penalties of the city marshal for neglect or failure to do duty.

SEC. 69. It shall be the duty of the city marshal to require all persons bringing cattle, sheep, hogs, goats, or other domestic animals, for food to the city to furnish him a description of the color, brand and mark of the animals, and to produce the ears, with the marks thereon, and it shall be the duty of the marshal to enter such description in a book kept by him for that purpose for inspec-
368 tion of any and all persons, provided that persons inspecting said book shall pay to the marshal a fee of ten cents for each inspection.

SEC. 70. Any marshal, deputy marshal or policeman, who shall be guilty of drinking any spirituous liquors, wine or beer, or anything intoxicating, while on duty, or during the hours when he should be on duty, unless excused by proper authority, shall, upon conviction, be discharged. No marshal, deputy marshal or policeman, while on duty, shall enter any barroom or beer saloon, except in discharge of his official duty; and, if upon conviction of same, shall be reprimanded, fined or discharged in the discretion of the mayor and council. It shall be the duty of the marshal, deputy marshal or policeman to report promptly to the mayor any officer violating the above ordinance.

CHAPTER IX.

Sexton.

SEC. 71. The sexton of the cemetery shall be elected annually by the city council, and shall be directly under the control of the cemetery committee of the city council, and shall be required to give bond in the sum of five hundred dollars, payable to the mayor and council conditioned for the faithful discharge of his duties as sexton, provided the city council shall see fit to require such bond.

SEC. 72. He shall have the general care of the cemetery, and superintend the digging of all graves and the burying of all dead bodies therein. Upon being notified of a funeral, he shall, without delay, make all necessary preparations, and see that they are properly and punctually carried out. He shall dig, or cause to be dug, all graves to the depth of four feet, when to be walled up, and four and one half feet when not to be walled up.

SEC. 73. He shall keep a complete record of the owners of lots in cemeteries, and shall not allow any corpse to be buried on a private lot without the consent of the owner thereof. He shall permit none but the bodies of deceased white persons to be buried in the cemtery.

SEC. 74. It shall be his duty to see that all ordinances, rules
369 and regulations, in relation to the cemetery, are strictly enforced and any violation thereof shall be by him promptly reported to the marshal of said city and to the mayor.

SEC. 75. He shall keep in a book, to be kept by him for that purpose, a complete list of persons buried in the cemetery, their names, ages, and sex, and a statement as to whose lot buried, and if any body be disinterred and removed without the cemetery or upon a new lot in the cemetery, he shall enter upon his record all the facts relative thereto. Said book shall be furnished at the expense of the city.

SEC. 76. In addition to his salary, which shall be fixed by the mayor and city council each year, he shall be entitled to a fee not to exceed five dollars for digging a grave and interring the body therein, or superintending the interring of the body. He shall be allowed to charge twenty per cent. on the cost of all material at market prices used in walling up graves, when he contracts to have said work done. For all other services he shall receive such compensation as may be agreed upon between the parties. He may demand his fees for all burials from parties living without the city limits in advance.

SEC. 77. The sexton shall bury all paupers, when so directed by the cemetery committee, or the chairman thereof, and for such services shall receive such compensation as the city council shall direct, to be paid out of the city treasury upon orders drawn by the chairman of the cemetery committee.

SEC. 78. The sexton shall at once number each and every lot in said cemetery, and shall make, or cause to be made, a map or drawing of the same and enter in his record, hereinbefore provided for, the name of the owner of said lots. He shall also keep in his book a complete list of vacant lots, and enter the name of purchasers thereof so soon as sold and paid for.

SEC. 79. For any failure or refusal to dig, or cause to be dug, any grave within six hours after being notified so to do, or for any other failure or neglect of duty, without sufficient excuse, he shall be punished by fine and imprisonment, either or both, or removed from office, in the discretion of the mayor and council.

370 SEC. 80. The sexton shall not dig a grave in said city cemetery for any person, except paupers, until he is satisfied that the lot has been bought and the purchase price paid therefor.

SEC. 81. The city sexton is hereby made a policeman and is authorized and empowered to arrest any person or persons found violating any city ordinance pertaining to the cemetery of said city, and turn them over to the marshal or any police of said city, whose duty it shall be to prefer charges against said person or persons, as for the violation of any other ordinance of said city.

Article II.

Chapter X.

Cemetery.

Sec. 82. The selling of all lots in the cemetery shall be done by the clerk of council, who shall make out and deliver to the purchaser, upon receipt of the purchase price, a deed to the same, which shall be signed by the mayor and the clerk for the city. The price of all lots shall be ten dollars for white persons residing in the city, and twenty dollars for white persons residing out of the city limits.

Sec. 83. No carriage, or other vehicle, shall be allowed to enter the cemetery, except such wagons, carts, or other vehicles as may be used in carrying building materials or other necessary articles within the same; and at funerals the hearse and such other vehicles as the sexton may permit to enter, containing the family and friends of deceased.

Sec. 84. All piles of earth, brick, rubbish or building material of any kind, shall be removed by the person placing the same in the cemetery within twenty-four hours after the completion of the work for which they were used.

Sec. 85. No person shall mutilate, or in any manner injure or deface any monument, tombstone, gate, fence, railing, or enclosure of any kind, character or description, in or around the cemetery, or break, injure or destroy any wild or cultivated flower, shrub, or plant, tree, in said cemetery.

Sec. 86. All work, improvements, and repairing done upon
371 the grounds of the cemetery, and the enclosures thereof, shall be done under the immediate supervision of the sexton, and by the direction of the cemetery committee, provided that parties owning lots may improve them in such manner as they may see fit.

Sec. 87. The present enclosure shall constitute and compose the city cemetery, and shall not be enlarged or dimi-shed, except upon the recommendation of a majority of the board of aldermen of said city.

Sec. 88. The said cemetery shall in future be known and distinguished as Cedar Hill cemetery, and shall be the burial place of citizens owning lots therein, and such other white citizens as may procure and purchase lots of said city.

Article III.

Chapter XI.

Fire Regulations.

Sec. 89. The fire department of this city shall consist of Protection Fire Company No. 1, and such other companies as may hereafter be

formed and created by the city council, or created under the forms of law.

SEC. 90. Each company now in existence, or hereafter to be formed or created, shall have power and authority to make and establish a system of by-laws, rules and regulations for the government of its members, and amend the same at the will of the company, provided that nothing contained in the said by-laws, rules and regulations, or amendments thereto, shall be in conflict with the charter, or any ordinance of this city; and every such company in existence, or hereafter to be formed shall have power to fine or expel any of its members for violation of any by-law thereof or any of the provisions of this chapter.

SEC. 91. Each of said companies, so long as it exists, shall be empowered to take charge and have the care and management of its respective engine house, engine, hose, ladders, hooks, and other apparatus for extinguishing fires, that already has been, or may hereafter be, provided by the city council for them.

372 SEC. 92. The members of the fire department, whenever there shall exist more than one company in said city, shall annually, on the third Monday night in January of each year, assemble together in the council chamber, in said city, and elect from their own body a chief of the fire department, and also elect an assistant chief, and report the names of the parties elected to the next regular meeting of the city council, and said election shall be approved by the city council before the said officers enter upon the discharge of their duties. Vacancies in said offices shall be filled as speedily as possible in the manner herein before pointed out.

SEC. 93. At all fires the chief of the fire department shall have absolute command of the fire department and the entire apparatus that may be employed for extinguishing fires; and in his absence, the assistant chief shall exercise the same authority. In the absence of both, upon the foreman of the senior engine company present.

SEC. 94. Said chief shall examine, not less than twice in each year, the engine houses, engines, hose, and all and every other apparatus belonging to said department, and make a written report to the city council of the condition of the same, and suggest needed improvements and repairs upon the same, and shall in all case- cooperate with the foreman of the company *upon* whose engine house, engines, or apparatus needs repairs.

SEC. 95. The chief shall order out, at least once in each year, all companies in the fire department for inspection and drill.

SEC. 96. All fire wells or cisterns made for the use of the fire department shall, from time to time, be carefully examined by the said chief, and defects therein reported by him to the chairman of the fire committee.

SEC. 97. The chief of the fire department shall report all defective flues, stove pipes, chimneys, combustible matter or any other thing that is likely to cause fires, to the chairman of the fire committee,

who shall at once present the matter to the city council, who shall at once have the same removed or remedied and made secure.

Sec. 98. The fire companies of said city, when the chief is
373 elected, shall prescribe a uniform for the chief and assistant chief, so they may be easily distinguished from the officers and members of the companies.

Sec. 99. It shall not be lawful for any person willfully to injure, molest, or in any way interfere with any cistern, engine, hose, hose cart, truck, water cart, hooks, ladders, or other apparatus, implement, or material of any kind, character or description, connected with, or belonging to, the fire department. Nor shall it be lawful to use any of said implements except for the benefit of the city. The loaning of any of said implements to private parties is strictly forbidden. It shall not be lawful to ring the fire alarm, or use the fire bell, except in alarms of fire and to call the companies together on their stated and call meetings. Any person violating any of the provisions of this section, shall be punished as hereinafter prescribed.

Sec. 100. It shall not be lawful for any person to, in any manner, obstruct the entrance to any engine house in use or under the control of the fire companies of this city, and any person violating this section, shall be punished as hereinafter prescribed.

Sec. 101. All appropriations made for the use and benefit of the fire department of this city shall be first recommended by the fire committee and voted upon by the city council, and regularly passed and warrant drawn therefor, expressing the purposes minutely in said warrant.

Chapter XII.

Danger from Fires.

Sec. 102. It shall be the duty of the city marshal and policemen, in connection with the fire committee, to examine frequently into the condition of stove pipes, chimneys, and fire flues in the city, and if found to be dangerous, to report the same to the chairman of the fire committee, who shall immediately examine them personally, and if, in his judgment, they are dangerous, he shall issue a written order and have the same served instanter by the city marshal or a policeman, directing and requiring the owner thereof to re-
374 pair said defect. And the owner thereof shall repair the same in twenty-four hours thereafter. If the owner thereof should fail or refuse so to do, then the chairman of the fire committee shall have the repairs made and executions issued (as pointed — in the charter and laws of said city), against the owner of said premises, which execution shall forthwith be placed in the hands of the marshal, and by him collected by levy and sale, or otherwise. And for every failure on the part of the owner of said property to obey the order herein provided for, the offender shall be tried and pun-

ished by a fine not to exceed sixty dollars, or imprisonment, or otherwise, not to exceed the time allowed by the charter of said city.

SEC. 103. No person shall be allowed to camp within the city limits with any wagon, cart, or other vehicle and team, except in a regular wagon yard, licensed as such by the city council. And any person convicted of so doing, shall be punished by fine not exceeding twenty dollars, or imprisonment in the chain-gang or guard house, in the discretion of the mayor, said imprisonment not to exceed thirty days.

SEC. 104. No person shall kindle or build a fire upon any sidewalk, or in any street, or on any public square of this city, under a penalty of ten dollars for each offense, or imprisonment in chain-gang not more than twenty days, in discretion of the mayor; provided that blacksmiths shall be allowed to build a fire in front of their shops for the purpose of shrinking tires.

SEC. 105. Upon complaint being made to the city council that there is danger of fire from a forge or smith shop in said city, they shall immediately examine into the case complained of, and if, in their judgment, the complaint is well founded, and the removal of the said forge or smith shop is absolutely necessary to insure the safety of adjoining buildings, they shall cause the clerk to prepare written notice to the owner or occupant of said forge or smith shop requiring him in twenty-four hours after the service of said notice to remove the same, said notice to be served by the marshal, and if the owner shall fail or refuse so to do, he shall be fined or imprisoned in the discretion of the mayor, not to exceed forty dol-
375 lars, or fifty days' imprisonment in chain-gang of said city. And the mayor and city council shall forthwith have the same removed at the expense of the owner thereof, and execution shall issue therefor in the manner pointed out in the charter and laws of said city, and levied as provided for levying tax and other *fi. fas.*

CHAPTER XIII.

Fire Limits.

SEC. 106. The fire limits of said city shall extend from Second avenue to Fourth avenue, and from Vine to Stonewall streets, and on Lee to Orange streets.

SEC. 107. Within the fire limits, as herein established, it shall not be lawful for any one to build, or cause to be built, any building, shed, or like structure, other than fireproof, except by the special permission of the mayor and council, which must be unanimous, and to be removed at the will of the mayor and council in twenty-four hours after notice served requiring the removal thereof. Any person or persons violating, or attempting to violate, the provisions of this section, shall be punished by fine not to exceed fifty dollars, or imprisonment in the chain-gang of said city or the guard house

for such time as the mayor may see fit to imprison the offender, said imprisonment not to exceed the time limited by the charter of said city.

SEC. 108. Whenever any person or persons, either by himself, herself or themselves, in person, or through agents or employés, shall undertake to build or erect any structure other than fireproof, within the fire limits (and where no wooden buildings existed in the year 1876), except by special permission, as hereinbefore provided for, the mayor and council shall cause three days' notice to be given said person or persons, their agents and employés, to desist from work thereon, and to forthwith remove the materials intended for said building, or other structure, and upon failure of the parties so served to obey said summons, the marshal shall arrest and bring the offending parties before the mayor's court for trial, and if found guilty, shall be punished by fine and imprisonment in the
376 discretion of the mayor, said fine not to exceed fifty dollars and imprisonment in chain-gang or guard house not to exceed time allowed under the charter of said city. And the mayor and council shall have power to have the said material removed, and to issue execution in terms of the laws of said city against the owner thereof for the actual cost of removing the same, which shall be levied and collected by the marshal as other executions.

SEC. 109. In all cases of sheds, houses, or other buildings, not fireproof, now in existence, or hereafter built or erected with or without the consent of the mayor and council, as hereinbefore provided, and it shall be deemed necessary for the safety of said city to have the same removed, the said mayor and council shall have served upon the owner or occupant of said house, shed or other structure, to have the same removed within ten days, and upon his or her failure to comply with said notice, the mayor and council shall order the marshal to procure a force sufficient to remove the same and return to the clerk the cost thereof, and the clerk shall issue an execution, signed and countersigned as required by law, against the owner of said structure, which shall be placed in the hands of the marshal and collected as other executions by him.

ARTICLE IV.

CHAPTER XIV.

Chain-gang.

SEC. 110. The mayor and city council shall at once take steps to form and provide a chain-gang to be known as the city chain-gang, *where*, in violations of the laws and ordinances of said city may be punished by work and labor by the offenders upon the streets and sidewalks, alleys and buildings and structures belonging to said city and elsewhere as the said mayor and city council shall provide and direct, said work and labor to be under the immediate supervision and direction of the street committee.

SEC. 111. There shall be at all times during work hours of the chain-gang, which shall not exceed ten hours a day, present,
377 with parties sentenced to work on the chain-gang, the street overseer, who shall guard and prevent the escape of said prisoners and direct and lay out work upon which they are employed, and when not employed at work they shall be confined in the city guard house or some other building to be hereafter provided for their safe keeping. The said prisoners shall receive at the hands of the street overseer humane treatment and shall be fed with a sufficient quantity of wholesome food.

SEC. 112. The street committee shall at once purchase in the market a sufficient supply of chains and other needed apparatus to prevent the escape of prisoners confined in the chain-gang, and shall draw their warrant, countersigned by the mayor, on the treasurer of said city for the cost thereof.

SEC. 113. It shall be the duty of the street overseer to keep a book in which he shall register the names of all persons sentenced to the chain-gang, the date of the sentence and the date when he or she is to be discharged.

SEC. 114. In the event of a sentence being pronounced on any one requiring him or her to work on the chain-gang of said city for a specified number of days, with the option to be released upon the payment of a sum of money and costs, it shall not be lawful to deduct any sum from the amount fixed in the sentence because of work done on the chain-gang before the money is tendered to pay the fine and costs.

SEC. 115. In all cases of sentence to work on the chain-gang and the party refuses and fails to work and labor as required, it shall be the duty of the street overseer to report said case or cases to the chairman of the street committee, who together with the members of said committee shall direct the street overseer to use such measures as they deem expedient and best to secure a compliance with the law and insure work by the said party.

SEC. 116. The utmost good faith is required of the street overseer and in no case will he be permitted to ill use, maltreat or wantonly punish the convicts under his charge. And in all cases when it is satisfactorially shown that the said overseer has wantonly abused, maltreated, or ill used a convict in his charge, upon convic-
378 tion therefor he shall be punished by fine and imprisonment in the discretion of the mayor, not to exceed one hundred dollars, and imprisonment not to exceed sixty days, and so much of either or both as may seem just and proper.

SEC. 117. A street overseer convicted of wantonly maltreating a convict in his charge shall, in addition to the penalty hereinbefore provided, be discharged from his said office of street overseer, and shall not again be eligible to the same office.

SEC. 118. It shall be the duty of the party in charge of the guard house, or other place where convicts are kept when not at work, to keep the same clean, and to provide sufficient bedding at the ex-

pense of said city to keep the convicts comfortable, and it shall be the duty of the street committee not less than once in each month, to inspect the said apartments and report their condition to the council.

SEC. 119. In cases of sickness among the convicts, it shall be the duty of the street overseer, or the keeper of the guard house or house where the convicts are kept, to report at once the case to the chairman of the street committee, and in his absence, to some other member of the street committee, who shall, if deemed necessary, provide a physician for each case at the expense of the city.

SEC. 120. It shall be the duty of the officers connected with and controlling the chain-gang of the city to keep all expenditures connected with this department separate and distinct from all other branches of the city's expenditures, and to keep a record of the same.

SEC. 121. When not engaged in work on the streets, sidewalks, cemetery, buildings, or other property of the city, it shall be lawful for the street committee to make contracts with private persons for labor to be performed by the convicts on the chain-gang at specified prices to be paid into the city treasury, but in no case shall it be lawful for the convicts on the chain-gang to be turned over to the hands of others than the street overseer.

SEC. 122. It shall be the duty of the keeper of the guard house, or other place provided by the council for keeping convicts
379 while not employed at work, to remove such of their chains and shackles as are provided to be worn during work hours, and to chain and shackle them in such way as will give them most ease and comfort and insure their safe keeping. For any violation of this section, the party, upon conviction, shall be punished as provided in section 116 of this chapter.

ARTICLE V.

CHAPTER XV.

Revenue and Collection of Taxes.

SEC. 123. It shall be the duty of the city council, as soon as practicable in each year, to assess a per centum as tax on property, real and personal, owned and held in the city of Dawson, by its citizens or others, for the purpose of raising a revenue for the support of the city government and liquidating and paying off outstanding indebtedness against the city; and the per centum levied shall not exceed one per cent. upon said taxable property.

SEC. 124. Each and every person, and all companies and corporations, liable for the payment of any tax or taxes, whether specified tax or tax upon property within the corporate limits of said city, are hereby required, either in person or by a properly constituted agent, to furnish the clerk of the city council with a return, under oath, of

all such specific tax or taxes, and of all the taxable property, real and personal, owned or held by them in said city in their own right, as agent, guardian, trustee, or otherwise, on the first day of April preceeding the making of said return.

SEC. 125. The following oath shall be administered to all persons making tax returns to the clerk, who is hereby authorized and required to administer said oath:

"I, A. B., do solemnly swear that the account I now give is a just, true, and correct account of all the taxable property which I was possessed of, held or claimed within the corporate limits of the city of Dawson on the first day of April of the present year, or was
380 interested in or entitled to, either in my own or in the right of any other person or persons as parent, guardian, executor, administrator or trustee, and that I did not, prior to the said first day of April, remove from said city limits any part or parcel of the property I held in any capacity whatever to evade making return thereof, and the said return is a true and correct return, so help me God."

SEC. 126. All returns by parties of property for taxation shall be made to the clerk of the city council, and the time for making said returns shall commence on the first Monday in May of each year, and the books closed on the first Monday in August.

SEC. 127. It shall be the duty of the clerk to make out an alphabetical digest of the returns so made to him, and all persons who are liable to taxation and shall fail or refuse to make their returns within the time prescribed in the preceeding section, shall be entered on the said digest as defaulters. Immediately after the expiration of the time for making returns, the clerk shall proceed to ascertain what persons and property, real and personal, and other subjects to taxation, are in default, and from the best and most reliable sources in his power shall assess the personal property, under his oath of office, and furnish the board of assessors with a list of the defaulters as to real estate, who shall assess the same as in other cases, and the said clerk shall enter the same on the digest with double taxes due on all such property in default. The provisions of this section shall apply to all property in the city, regardless of where the owners or agents reside, provided the council, in their discretion for sufficient excuse shown, may relieve any party from the double tax so assessed.

SEC. 128. The clerk shall keep open the books for the payment of taxes from the first Monday in October of each year until the first Monday in December of said year, when the same shall be closed, and all taxes upon property in said city shall be due and owing on the first Monday in October. After the said books are closed the clerk shall forthwith proceed to issue tax executions, signed by himself and countersigned by the mayor in the name of the
381 city council of Dawson and direct the city marshal, who shall proceed to collect the same by levy and sale.

SEC. 129. All sales under such executions, if levied on personal

property, shall be advertised ten days by written posters, at three different places in said city, one of which shall be posted at the court house door of said city, where all marshal's sales shall take place, and all such sales shall take place on the first Tuesday in the month, and between the hours of ten o'clock in the forenoon and four o'clock in the afternoon of the day. If levied on real estate the sale shall be advertised once a week for four weeks in the *Dawson Journal* prior to said day of sale. All advertisements shall plainly describe the property to be sold and the time and place of such sale. The marshal shall sell only a sufficiency of personal property to pay the taxes due and all costs, and when the taxes and costs are fully paid up and there are funds in his hands arising from the sale of property, he shall pay the same over to the owner thereof, provided he is not kept from so doing by legal process.

SEC. 130. It shall be the duty of the marshal to put purchasers, at sales had by him, in possession of property bought at such sales.

SEC. 131. When property sold by the city marshal is real estate, it shall be his duty to make to the purchaser thereof a deed, properly executed, to said property so sold, signed by him in his official capacity.

SEC. 132. Whenever a *fi. fa.* for taxes, or any other indebtedness, shall issue in favor of the city council, as required by these laws and ordinances, and shall be levied by the marshal on property, and such property shall be claimed by a third person, not a party to the execution, the claimant thereof shall make affidavit claiming said property before a justice of the peace of said county, and shall make and execute a damage bond payable to the city council, and give good security thereon, to be judged of by the levying officer, conditioned to pay all damages that the court or jury trying the issue shall assess against him, which shall not be less than ten per cent. in case it should appear that said claim was interposed for delay only, as well as for the payment of all costs. In cases of levy on per-
382 sonal property, the claimant shall give a forth coming bond, payable to the city marshal, in a sum equal to double the amount of the *fi. fa.*, conditioned to produce the property at the time and place of sale, provided it is found subject with good security thereto, to be judged of by the levying officer, and in case of failure to give the forth coming bond, the levying officer shall keep possession of the property levied on until the issue is tried.

SEC. 133. A claim having been interposed and bond given in terms of section 132, it shall be the duty of the marshal to return the *fi. fa.*, together with the claim affidavit and claim bond, to the next term of the justice's court of 1154th district, G. M., which shall stand for trial as other claims in justices' courts, provided the *fi. fa.* is under one hundred dollars and the levy is not on real estate.

SEC. 134. When the *fi. fa.* is for more than one hundred dollars, or the levy is upon real estate, the *fi. fa.*, with the claim papers, shall be returned by the levying officer to the clerk of the superior court

of Terrell county and there tried under the same rules and regulations governing the trial of other claim cases in the superior courts of this State.

SEC. 135. No person shall be allowed to vote in any election for officers of the city, or upon any question in relation to said city, who has not paid all taxes lawfully assessed against them, and which they have had an opportunity of paying, provided that if an election should be held before the first day of December of any year, the taxes due for that year will not be required to be paid, but taxes for all previous years.

SEC. 136. That all persons moving into the city of Dawson after the first day of April in each year, shall be subject to a city tax *pro rata* for the remainder of the year, in like manner, as if they had been here on the first day of April of said year. The marshal shall return to the clerk a list of such persons moving into said city and notify them to make their returns as required of other tax-payers in the city. All persons failing to make said returns, within twenty days after being notified so to do, shall be subject to the like
383 penalties of persons in default in making their returns of taxable property, and it is hereby made the duty of the clerk to assess the stock of such persons to the best of his ability, and to issue an execution directed to the marshal of the city, and all executions shall be levied forthwith by the marshal, who shall, after levying, advertise the same, as provided for in section 8 of the — city of Dawson. Any violation not herein provided for, the penalty shall be left discretionary with the mayor.

CHAPTER XVI.

Tax Assessors.

SEC. 137. At the regular meeting of the city council in March of the present year, and on the first Monday night in January of each succeeding year, or as soon thereafter as possible, the mayor and council shall elect a board of tax assessors of said city, composed of three citizens, freeholders of the city, none of whom shall be a member of the city council, whose duty it shall be to assess the value of all the real estate and personal property in this city subject to taxation, and make a return thereof, under oath, to the council by the first Monday in September following, and the clerk shall enter on the tax digest the valuation affixed by them to the real estate and personal property to assessed.

SEC. 138. If the tax-payer is dissatisfied with the assessment, it shall be his privilege to have the matter submitted to three disinterested, upright citizens of said city, one of whom may be selected by the tax-payer, one by the board of assessors, and the two to select a third, who shall be the umpire, and a majority of the said arbitrators shall pass upon and affix the value of the property in question.

SEC. 139. Before entering upon the discharge of their duties, the assessors shall each take and subscribe before the mayor the following oath:

"I, ——— ———, do solemnly swear that I will, to the best of my knowledge and ability, without fear, favor, or affection, assess the true value upon all the real estate and personal property in
384 the city of Dawson, returned to the clerk of the city council, or certified by him to be in default, so help me God."

SEC. 140. For their services the assessors shall each receive such sum out of the city treasury as the council shall annually direct.

CHAPTER XVII.

License.

SEC. 141. It shall be the duty of the city council at the regular meeting in January of each year, or as soon thereafter as possible, to examine and if in their judgment it is necessary to make changes and alterations in the annual license ordinance of said city to increase or diminish, as they find necessary, the license taxes on the sale of any and all things for which license are required, or upon all trades, occupations, exhibitions, shows, drays, carts, wagons, billiard and pool tables, nine or ten pin alleys, bowling alleys, peddlers, hucksters, street drummers, itinerant traders, professors, pawn brokers, hotels or taverns, boarding or other public houses, and such other subjects or things not herein mentioned in the way of trades, occupations, etc., as they may be authorized under the charter of said city to require license for, provided that all additions to the license ordinance and the charges therein shall be published one time in the *Dawson Journal*. Provided the annual license ordinance passed for the previous year shall remain of force until changed or altered by the said city council.

SEC. 142. All applications for license of any kind shall be accompanied by the money for the price thereof and the fee for issuing the same, except applications for retail liquor license. No license shall issue for a longer time than twelve months, and all license granted shall expire on the first of the month, unless otherwise provided, and shall not be transferred. License may be granted to firms upon the same terms as to individuals.

SEC. 143. Each and every person or persons who shall engage in or carry on any trade, business or occupation, or have or keep for gain, any article or thing which the council has declared the subject matter of license (without first having procured a license
385 therefor from the clerk as herein provided), shall, on conviction, be punished by fine not exceeding fifty dollars and imprisonment in the chain-gang not to exceed forty days, either or both for each day he, she or they may so offend, or so much of either or both as the mayor in his discretion shall see proper to inflict.

SEC. 144. No person shall retail any wine, beer, cider, or other

spirituous or fermented liquors in this city in quantities less than one quart without license therefor, to be issued by the clerk upon the applicants paying the sum fixed by the annual license ordinance, and otherwise complying with the provisions of this chapter.

SEC. 145. Any person or firm desiring to have license issued to them for the purpose of carrying on any business or occupation for which license- are required in the city of Dawson, shall make application to the clerk stating therein the nature of the business he desires to engage in and the house or place where he desires or intends to engage in said business, and upon being required so to do, produce a certificate of two or more respectable persons that he, she or they, are fit and proper persons to be entrusted with such license. If license- are granted to such person or firm, they shall give bond with good security to be approved of by the city council in the sum of five hundred dollars, payable to the city council, and conditioned to keep a decent and orderly house. Upon said bond being given and the other requirements of this chapter being complied with the clerk shall issue the license.

SEC. 146. The place of carrying on said business may be changed by unanimous consent of the mayor and city council, had at a regular meeting, but no one shall be permitted to retail spirituous or fermented liquors in or upon any public square, street, alley or sidewalk of the city. No person or firm shall be permitted to retail spirituous or fermented liquors or carry on any other business, trade or occupation, for which license- are required, in more than one establishment at the same time under one license. Any person violating the provisions of this section shall, upon conviction, be punished by fine not to exceed fifty dollars and imprisonment
386 not to exceed thirty days, either or both in the discretion of the mayor.

SEC. 147. All license- issued shall be regularly registered by the clerk in a suitable book, and said register shall, at all times, be subject to inspection by the mayor and council, or any member thereof, and shall contain date of issuing, time it expires, the name of the party or firm to whom issued and the business to be engaged in.

SEC. 148. No person shall, by himself or employés, or others, run any wagon, dray or cart, or other vehicle of transportation, for hire within the city without a license from the city council, under the rules and regulations of this chapter and the license ordinances; provided, this section shall not be so construed as to prohibit the hauling of fire wood and building material to market.

SEC. 149. No owner or driver of a licensed dray shall, between sunrise and sunset (excepting Sundays and legal holidays), refuse to carry a load to or from any part of the city without a sufficient excuse for such refusal. Complaint of such refusal being made to the mayor, he shall order the arrest of the party refusing, and if it should appear that such refusal was without sufficient excuse, he may impose a fine of not more than fifteen dollars, and in his discretion order a forfeiture of the license.

SEC. 150. If any driver of a dray or licensed wagon, cart or other vehicle, shall demand more than the rate fixed by the council for hauling, they shall, upon conviction, be punished by fine not exceeding twenty dollars and imprisonment in the chain-gang not exceeding thirty days, or so much of either, or both, as the mayor in his discretion sees proper to inflict.

SEC. 151. Should the owner or owners of any dray, wagon, cart, or other licensed vehicle, demand for hauling a price greater than that fixed by the council for haulmg, he or they shall, upon conviction thereof, be punished by fine not to exceed forty dollars and imprisonment in guard house or chain-gang not to exceed forty days, either or both, or so much thereof, as the mayor, in his discretion, shall see proper to inflict.

387 SEC. 152. Any person desiring the issuing a license to him as vendue master or auctioneer in the city of Dawson, shall deposit with the clerk fifty dollars and his fee, and make written application to the mayor and council at the next regular meeting of the council for such license, and if such license is granted, said persons, before the same is issued, shall give a bond payable to the city council in the sum of one thousand dollars, conditioned to make prompt and honest returns of all goods sold by him and the prompt payment of the money arising therefrom, less his fees for selling, and for the faithful discharge of all the duties required of him by the laws of this State and the ordinances of the city of Dawson.

SEC. 153. Each vendue master or auctioneer shall, before receiving his license, take and subscribe the following oath before the clerk of council:

"—— ——, do solemnly swear that I will make prompt and honest returns and payments of the proceeds of all goods, wares, and merchandise, stock, or other things sold by me, to the person or persons entrusting the same to me for sale, and will do and perform all my duties as auctioneer or vendue master, so help me God."

Said affidavit shall be filed by the clerk in his office.

SEC. 154. No person or persons shall exhibit or perform in the city any kind of equestrian exercises, rope or wire dancing, concerts of music, fireworks, sleight of hand or theatrical performances, or give any other shows or exhibitions of any kind or character, for profit or gain, without first obtaining a license therefor under the provisions and requirements of the annual license ordinance of this city.

SEC. 155. All special tax license due the city be made payable in advance and not transferable, except by unanimous consent of the council. All retail liquor license expire from the first of January each year and to run for twelve months.

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ARTICLE VI.

CHAPTER XVIII.

Streets and Sidewalks—General Regulations.

SEC. 156. It shall be the duty of the city council, each year, to provide for the working and keeping in good order the streets and sidewalks of this city, and all such work shall be under ther immediate supervision and control of the street committee.

SEC. 157. No person or body corporate, firm or company, shall at any time open, lay out, extend, or in any manner alter any street, alley, lane, or open square, contrary to the original plan of the city without the unanimous consent of the city council at a regular meeting. Any and all applications for the privilege to alter, lay out, extend, or in any manner alter any street, sidewalk or alley, or public square, shall be published once a week for four weeks before the application is acted upon, said advertisement to be paid for by applicant or applicants.

SEC. 158. All advertisements for leave to alter or change any street, alley, sidewalk, lane, or open square in thiscity shall plainly and distinctly set out the proposed alterations the time and place of hearing the application, and the name of the party or parties applying.

SEC. 159. The city council shall have power and authority to lay out new streets, sidewalks, and alleys, or to alter or change existing streets, sidewalks and alleys.

SEC. 160. All owners or lessees of real estate in this city upon which business houses are located, shall, when required by the city council, cause to be laid in front of such property, under the direction of the street committee, well-made pavements of good, hard brick, stones, or wood blocks of such width and grade as may be directed by said committee, and all such owners or lessees shall keep the pavements in front of such property owned or leased by them in good order and repair. When the owner or lessees—shall be required to cause such pavement to be laid, or to repair pavement already in existence in front of said property, shall
389 fail or refuse to do said work in a reasonable length of time, the council shall have such work done forthwith, and the cost thereof charged to said owner or lessee, of whom payment shall be demanded by the clerk, and upon his or their refusal to pay, the clerk shall issue execution for said amount against said owner or lessee, and place the same in the hands of the city marshal, who shall at once proceed to collect the same by levy and sale.

SEC. 161. No person or persons, firm or corporation, shall erect any shed or awning in front of his, her, or their store without permission from the city council, and when permission is granted the same shall be neatly erected and painted, of equal height with sheds

or awnings adjoining them. Provided, however, this grant of privilege does not give any control or authority over the ground occupied, and may be withdrawn at any time at the option of the council.

SEC. 162. All persons planting out trees for shade or ornament upon the sidewalks shall plant them in a line with others on the same sidewalk, and in case of violation of this section, the council may have the same removed at the expense of the person or persons having the same planted.

SEC. 163. No person, firm or corporation shall be allowed to erect a fence, railing, platform, steps, portico, or other obstruction beyond the line of his, her or their lot and encroach upon any street, alley or sidewalk of the city.

In case any person, firm or corporation is erecting, or has erected, any such encroachment in the city, he, she or they shall be served with written notice to remove the same, and upon failure so to do in twenty-four hours after notice has been served, the marshal shall have the same removed, and the clerk shall issue execution against the person refusing to remove the same for cost of removal, which shall be enforced and collected as other executions in favor of the city council.

SEC. 164. Each and every male person in the city of Dawson over sixteen years and under fifty years, capable of working the streets, shall work thereon at least ten days in each year. All persons subject, and not paying amount assessed in commutation of said
390 work by the first day of April in each year, shall be summoned in writing by the city marshal to appear at the council chamber, at any time thereafter, to do said work on streets, and when so summoned and not appearing, they shall be brought before the mayor for contempt, and sentenced for twenty days' work on streets, to be released at any time by paying double the amount assessed in commutation of said work and all costs.

Each and every person liable to work the streets shall be allowed to pay, in commutation of said work, the sum of three dollars for each year.

CHAPTER XIX.

Offenses in Streets.

SEC. 165. No person shall deposit, throw, or place, or cause to be deposited, thrown, or placed, into or upon any public square, street, alley, or sidewalk of this city, any paper, rags, shavings, trash, chips, ashes, oyster shells, cuttings of vines, shrubbery or trees, or rubbish, filth offal, rotten fruit, vegetables, dead bodies, filthy liquids of any kind, or any other thing or things which is or may become offensive, or which may injure or damage any of said public squares, streets, alleys, or sidewalks, or interfere or hinder the free use and enjoyment of the same; provided the owners or occupants of any house

or store may be allowed to put in boxes or barrels, in front of their stores, waste paper and other rubbish swept each day therefrom in such manner as to prevent the same being scattered over the streets and sidewalks by the wind, until the same shall have been moved by the street cart.

SEC. 166. No person or firm shall deposit or put, or cause to be deposited or put, any vehicle of any kind or description, or any goods, wares, fire wood, boxes, barrels, casks, kegs, logs, or other obstruction, in or upon any street, alley, sidewalk, or public square of this city, so as to obstruct the free passage and use thereof; provided, that this section shall not be construed to prohibit the use of the streets, alleys and sidewalks for the necessary reception and
391 delivery of goods, wares, merchandise, fire wood, or other fuel, or to prevent workmen employed in building, repairing, or doing other necessary work, from depositing brick, lime, mortar, lumber, or other necessary material for the completion of said work, on the streets, sidewalks, or alleys contiguous thereto. Such material shall, in all cases, be by the parties, removed so soon as the work is completed or suspended.

SEC. 167. No person or persons shall dig, or have dug, any hole in any street, alley, sidewalk, public square or lot belonging to this city without the written permission of the mayor and at least three of the members of the city council then in office. Nor shall any person make, or cause to be made, any excavation or hole in any of the streets, alleys, sidewalks, or public square of this city; provided that any citizen, by the consent of the street committee, may construct a drain or hollow pavement for water to pass off.

SEC. 168. No person shall tie or hitch any horse, mule, ox, or other animal or animals, to any tree, or boxing around the same, or to any gate, fence, palings, or lamp-post; nor shall any person tie, hitch, or leave any horse or mule, ox, or other animal or animals, or drive, place, or leave any dray, wagon, buggy, or other vehicle, so near to any sidewalk, or upon any crossing, as to hinder, delay, or endanger the passage of any person or persons passing over and along said sidewalks and crossings.

SEC. 169. No person or persons shall ride or drive in the streets or alleys of this city in a rapid or disorderly manner, so as to endanger the person or property of any one in the city; nor shall any person or persons ride, drive or lead any horse, mule, ox, cow, or other domestic animal, or drive any dray, wagon, buggy, carriage, cart, or other vehicle, upon any sidewalk in this city.

SEC. 170. No person or persons, owners, shall permit any goat or goats to run at large within the city limits.

SEC. 171. No person having and owning any vicious cow, bull, steer, or heifer, shall permit such animal or animals to run at large in the corporate limits of the city.

SEC. 172. It shall be the duty of the marshal, deputy mar-
392 shal, and policeman to take up any horse or mule found loose in the streets o the city, and put him or her in some lot or

stable, to be designated by the mayor, for safe keeping, and when the owner of said animal is unknown to the marshal or police force, the taking up said animal shall be advertised in the city paper at least one time, and if the said animal is not claimed in thirty days after notice given, the horse or mule so advertised shall be sold at public auction to pay the expenses of taking up and keeping the animal, as well as all other costs attending the advertising and sale. The fee for taking up a loose horse or mule shall be one dollar, and for selling, one dollar. In case of a claim before sale to any animal taken up under the provisions of this section, the party claiming shall pay the entire fees and expenses of taking up and keeping the animal. When sold, the expenses of taking up, keeping, advertising and selling shall come out of the proceeds of the sale.

SEC. 173. It shall be the duty of the marshal and policemen to take up and impound any and all goats found running at large in the incorporate limits of the city, and after ten days' notice posted in writing at the door of the council room and post office, if not claimed and all expenses paid by the claimant, at the expiration of the ten days the marshal shall sell said goats to pay expenses. The fee for taking up goats shall be twenty-five cents per head.

SEC. 174. It shall be the duty of the marshal and policemen to take up and confine in some safe place, by them selected, any vicious cow, bull, steer or heifer found running at large in the incorporate limits of said city, and he or they shall be allowed a fee of one dollar for each of such animals taken up. They shall at once notify the owner of the taking up such animal, who, upon payment of charges, shall have possession thereof. And it shall be lawful for the party taking up such animal to protect himself from injury by the destruction of the animal.

SEC. 175. Proud bitches shall not be allowed to run at large in this city, and it shall be the duty of the city marshal and policemen to immediately kill any proud bitch running at large upon the streets of this city.

393 Each and every person or persons violating any of the sections of this and the preceding chapter of this article, shall be punished by imprisonment in the chain-gang not to exceed twenty days and a fine not to exceed thirty dollars, either or both, in the discretion of the mayor.

ARTICLE VII.

CHAPTER XX.

Nuisance.

SEC. 176. Anything within the incorporate limits of this city that worketh hurt, inconvenience, or damage to others, or tends to the immediate annoyance of the citizens in general, or to the destruction or impairing the value of property, or is manifestly injurious to the

health of the citizens or their safety, or tends to corrupt the morals of the people, is hereby declared to be a nuisance in the city, and may be abated in the following manner:

Upon information by the marshal, or complaint of any citizen, of the existence of any nuisance, in any part of the city, the mayor shall at once cause the clerk of the city council to give the person or persons alleged to be maintaining or keeping up the same, or the owner of the premises whereon the same exists, notice to abate the same within twenty-four hours after notice served upon him or them, or at the expiration of the said twenty-four hours to appear before the mayor and council (a majority of whom may act) and show cause why the same should not be abated.

SEC. 177. In all trials provided for in the preceding section, the mayor and council shall hear all evidence pertinent to the issue before them, and if the matter be by them declared a nuisance, they shall pronounce their decision and judgment, and order the party before them to at once proceed to abate the nuisance, and he shall be allowed twenty-four hours in which to comply with such order and judgment. At the expiration of said time it shall be the
394 duty of the marshal to at once proceed to abate the said nuisance and return to the clerk the amount of expenses incurred in the abatement thereof, and the clerk shall at once issue execution for said sum against the said party or parties in terms of the charter of said city, which execution shall be collected by the marshal, or other officer into whose hands it may be placed, by levy and sale of defendant's property.

SEC. 178. No person or persons shall build, have, or keep a privy, nor dig, have, or keep a sink, pit, or hole to be used as a privy, within four feet of any street, sidewalk, or public alley, or within three feet of the boundary line of his, her, or their lot.

SEC. 179. No person or persons shall build, have, or keep a privy in the business parts of this city without a sink or pit, unless he, she or they shall keep under said privy movable tubs or boxes, and have the same removed and cleansed once in every two weeks.

No person or persons shall allow a privy upon his, her, or their lot or premises, or a lot or premises under his, her or their control and occupancy, to be in an offensive and filthy condition.

SEC. 180. No person or persons shall permit dead carcasses of any animal or fowl to remain and decay on his, her or their lots or premises, or lots and premises occupied and controlled by them, but shall remove the same to a safe distance from their premises, and to a safe distance from the premises of others of said city.

SEC. 181. For each and every violation of the provisions of this chapter or any of the sections thereof, the offender, upon conviction shall be punished by imprisonment in the city chaing-gang for a term not to exceed twenty days and a fine not to exceed forty dollars, either or both, or so much of either or both as the mayor, in his discretion, may see proper to inflict.

395 ARTICLE VIII.

CHAPTER XXI.

Sanitary.

SEC. 182. At the regular June meeting of the city council in each year, there shall be elected a health officer, whose duty it shall be to visit each and every citizen's premises, private and public, at least once every week, and see that there is no accumulation of any filth, or anything that will likely cause or produce bad odor or sickness, and that all privies be well cleaned and disinfected once each week. That said health officer shall be sworn in and have full authority and pay of a policeman, and that the street carts and hands shall be subject to his command and direction.

SEC. 183. From and after the first day of June in each year, no citizen shall allow any accumulation of filth of any kind on his or her premises, and once each week each and every privy or privy vaults shall be cleaned and disinfected. All premises are open to visits of the city health officer, who shall give instructions as to what shall be removed or cleaned away, and that any one refusing to obey instructions of said health officer, or refusing to let him go on their premises, shall be dealt with as in section 204, article 9, of the ordinances of the city of Dawson.

SEC. 184. From and after the passage of this ordinance, between 15th day of May and October 1st, of each year, there shall be no accumulation of filth and decaying matter of any kind on any premises in the city of Dawson, and that all decaying matter, filth of any kind, accumulations under privies, etc., shall, at least once a week, be put in boxes, barrels, or some other convenient receptacle and placed in a convenient place where scavenger carts can get them for removal.

And it is further ordained that all premises, private or public, shall be open at all times to visits and inspection of health officers, and that owners or tenants of any lot shall clean up and put into boxes, or other receptacle, any matter of filth that said health officer shall direct to be removed. Any person or persons failing to comply with either of above sections shall be punished as pre-
396 scribe- in section 204, article 9, of the city ordinances.

ARTICLE IX

CHAPTER XXII.

General Offenses.

SEC. 185. No person shall willfully break, injure or destroy any public lamp, pump, shrub, vine, or tree, or the boxing around the same, or other property belonging to this city under a penalty of

sixty dollars or confinement in the city chain-gang not to exceed forty days, one or both, or so much of one or both as the mayor sees proper to inflict.

SEC. 186. No person shall cut, scratch, paint, or write on, or in any other mode or manner deface the walls, or any portion thereof, of any college, academy, school building, church, depot building, court house, engine house, or any other public building in this city; nor shall any person wantonly remove, deface, or injure any sign or ornament attached to any store, grocery, or office in this city. Any person or persons convicted of violating any of the provisions of this section shall be punished by fine not to exceed fifty dollars and imprisonment in the city chain-gang not to exceed forty days, either or both, or so much of either or both as the mayor in his discretion, shall see proper to inflict.

SEC. 187. No person or persons shall be permitted to keep or maintain within this city a house or houses of illfame, or bawdy house, or house for the practice of adultery and fornication, or fornication and upon complaint lodged, and proof produced to the mayor of the city of such house or houses kept in this city, it shall be his duty to order the person or persons occupying and keeping said house to leave the city, and upon their failing to comply with said order in four days, the mayor shall cause the arrest of the occupants thereof and have them brought before him to be punished as provided in section 186 of these ordinances.

397 And he shall order the city marshal forthwith to remove the said person or persons, together with their movable goods and chattels, without the city limits.

SEC. 188. Any and all persons notified to appear before the mayor, under the provisions of the preceding section, shall have the right and privilege of a hearing and the benefit of counsel, if provided by themselves, and shall have the enforced presence of witnesses in their behalf, and in all cases they shall have the right to enter an appeal from the decision of the mayor to a full board of the council.

SEC. 189. No person or persons owning or controlling any real estate, houses, or tenements within the corporate limits of this city, shall let, lease, or rent any house or tenement in the city to any person or persons for the purpose of maintaining or carrying on fornication or adultery and fornication, or for the purpose of practicing lewdness therein.

SEC. 190. When any owner or agent of a house or houses situated in this city shall let, lease or rent any house or tenement to another or others, and the person or persons so renting or leasing the same shall themselves practice lewdness therein, or permit others to practice lewdness therein, the said house shall be declared a house of illfame, and it shall be the duty of the owner or agent thereof to remove, or cause the tenants thereof to be removed, in five days after notice thereof served upon him by the city marshal under the order of the mayor of said city.

For any violation of this section the offender, upon conviction, shall be punished as prescribed in section 186 of these ordinances.

SEC. 191. No person shall fire a gun, pistol, or other firearm within two hundred and fifty yards of any house (except in cases of military parade), or burn any rockets, fire crackers, or other fireworks of any kinds or description whatever, upon any public square, street or sidewalk without permission from the mayor of this city.

For any violation of this section the party convicted shall be punished as prescribed in section 186 of these ordinances.

398 SEC. 192. No person shall throw or shoot into or upon any public square, street, alley, or sidewalk, or into or upon the lot of any citizen, without his, her, or their permission, by hand or with a sling, or from a "flip," or other projectile instrument operated by the elasticity of India*n* rubber or other material, any shot, bullet, stone, or other miss-le of any kind whatever.

For any violation of the provisions of this section, the party so offending shall, upon conviction, be punished as prescribed in section 186 of these ordinances.

SEC. 193. No person shall fly a kite in any settled part of this city, or upon the streets and avenues used for travel with horses, mules, etc., and it shall be the duty of the marshal of the city, or any policeman, to arrest the parties violating this section and destroy the kite, and bring the offender before the mayor's court to be dealt with.

Any party or persons violating the provisions of this section shall, upon conviction, be punished as prescribed in section 186 of these ordinances.

SEC. 194. No person or persons shall paint, print, post, or cause to be painted, printed, or posted, any bills or advertisements of any kind on any building, shed, or fencing in this city except by the consent of the owners or occupants thereof.

For any violation of this section, the party or parties shall, upon conviction, be punished as prescribed in section 186 of these ordinances.

SEC. 195. No person or persons shall in the day time, bathe in any stream, pond, vat, or tank in sight of any street, house, bridge, or causeway in the incorporate limits of this city.

For any violation of the provisions of this section, the party convicted shall be punished as prescribed in section 186 of these ordinances.

SEC. 196. It shall not be lawful for any person or persons to carry on or engage in horse racing or cock fighting within the incorporate limits of this city.

For any violation of this section the party offending shall, upon conviction, be punished as prescribed in section 186 of these ordinances.

399 SEC. 197. No person or persons shall tipple or drink any spirituous or fermented liquors on any public square, street, alley, or sidewalk in this city in the day time.

Any person violating the provisions of this section, shall, upon conviction, be punished as prescribed in section 186 of these ordinances.

SEC. 198. Any person who shall be guilty of using boisterous or profane, obscene, or vulgar language in this city, or any part thereof, so as to disturb the quiet, peace, and good order of its citizens, or shall use to or of another, and in his or her presence, abusive language tending to cause a breach of the peace, shall upon conviction therefor, be punished as prescribed in section 186 of these ordinances.

SEC. 199. Any person who shall be guilty of using, in said city, profane or vulgar language in the presence of a female, shall, upon conviction therefor, be punished as prescribed in section 186 of these ordinances.

SEC. 200. No person shall make an indecent exposure of his or her person in any public place in said city.

Any person violating the provisions of this section, shall, upon conviction, be punished as prescribed in section 186 of these ordinances.

SEC. 201. No person or persons, shopman or dealer, shall expose at show windows, store fronts, or in any other place in this city, obscene or vulgar pictures or cards, or obscene devices of any kind or character.

Any person or persons violating the provisions of this section shall be punished as prescribed in section 186 of these ordinances.

SEC. 203. No person or persons, by themselves, their agents, or employés, shall sell, or expose for sale in this city, any obscene or vulgar literature of any kind, and any person or persons so offending shall, upon conviction thereof, be punished as prescribed in section 186 of these ordinances.

SEC. 204. No person shall resist, or in any manner interfere with any of the officers of this city in the discharge of their duties, or aid or assist any person or persons arrested by any of said officers to escape from the custody of the arresting officer, or assist in any way or manner any person to escape from the city guard house, or in any manner aid prisoners confined in the chain-gang of said city to escape therefrom.

Any person or persons violating any of the provisions of this section, shall, upon conviction thereof, be punished by confinement at labor in the chain-gang of said city not to exceed fifty days, and fine in a sum not to exceed eighty dollars, and any one or more of these punishments may be ordered in the discretion of the mayor.

SEC. 205. No person shall, in this city, act in a boisterous, disorderly, riotous, or tumultuous manner, or do any act or acts endangering the safety of any citizen or person in said city, or the property of any person, or do any act against the public peace, morality, or decency not herein enumerated. Any person found violating any of the provisions of this section, shall be arrested by the city marshal or policeman and confined in the city guard house until he or she

can be brought before the mayor's court for trial, and upon conviction of any of the offenses herein set out, shall be punished by confinement at labor in the city chain-gang not to exceed twenty days, and fine not to exceed forty dollars, and any one or more of the said punishments may be ordered in the discretion of the mayor.

SEC. 206. Any person convicted of violating any of the provisions of sections 85, 99 and 100 of these ordinances, shall be punished by imprisonment at labor on the city chain-gang for a time not less than forty nor more than sixty days, and fine not less than eighty nor more than one hundred dollars. Provided, the mayor may, in his discretion, order the prisoner released from said confinement upon the payment of the amount of fine imposed.

SEC. 207. It shall not be lawful for any person or persons, firm, company, or corporation to keep open a tippling or drinking saloon, or house where spirituous, malt or fermented liquors are kept for sale by the drink in this city, on the Sabbath day or night, and it shall not be lawful for the keepers of drinking saloons to give or sell spirituous, fermented, or malt liquors to any person in
401 this city on the Sabbath day or night.

Any person or persons violating any of the provisions of this section shall, upon conviction, be punished by imprisonment at labor in the city chain-gang not more than thirty days, and fined not to exceed fifty dollars, one or both, or so much of both, or either, as the mayor, in his discretion, may see proper to inflict

SEC. 208. It shall not be lawful for any person, by himself, agent, or servant, to keep, have, use, or maintain a house for gaming nor shall he permit any persons to come together in any house or room occupied by him in this city and play for money, or other thing of value, at any game of loo, faro, brag, bluff, euchre, bunco, pedro, seven-up, or any other game or games played with cards.

Any person violating the provisions of this section shall, upon conviction, be punished as prescribed in section 207 of these laws and ordinances.

SEC. 209. It shall not be lawful for any person or persons to play or bet anything of value on any game or games of chance or hazard of any kind or character, in or out of doors, within the corporate limits of this city.

Any person or persons convicted of so doing, shall be punished as prescribed in section 207 of these laws and ordinances.

SEC. 210. It shall not be lawful for any person to loiter and idle about the streets of this city, having the ability to work and no visible means of support.

And it shall be the duty of the marshal and policemen of this city to arrest and bring before the mayor for trial any person found loitering and idling about the streets who are able to work and have no visible means of support, and upon conviction, it shall be the duty of the mayor to sentence the person so convicted to labor on the city chain-gang for such time as he deems just and proper, not to exceed sixty days.

SEC. 211. In all cases where parties are convicted and sentenced by the mayor to be confined in the city chain-gang at labor, it shall be lawful to confine the said prisoner in the city guard house when not actually at labor in the chain-gang.

402 SEC. 212. Any person or persons who, by permission of the city council of Dawson, shall dig, or have dug, any ditch or excavation in any street, alley or sidewalk of said city, shall pack the dirt back in said ditch or excavation and leave it in as good condition as before the opening was done.

Any one failing to comply with this ordinance shall be guilty of disorderly conduct as prescribed in section 205, article 9, of the ordinances of the city of Dawson.

SEC. 213. After the 20th day of July, 1889, it shall be unlawful for any person to allow their cattle or hogs to run at large in the city limits of Dawson.

SEC. 214. It shall be the duty of the police force of said city to arrest and impound all cattle and hogs found running at large in the limits of said city.

SEC. 215. The city marshal shall cause to be posted in a conspicuous place at the city hall an accurate description of all stock impounded; said notice shall be posted on the day of arrest and run for five days.

SEC. 216. Said stock shall be kept impounded and cared for by the marshal for five days, at the expiration of which time they shall be sold at public outcry, before the city hall to the highest bidder; provided, however, the owner or claimant of any stock so impounded may at any time before the day of sale, have the same released by paying all costs.

SEC. 217. The fund arising from the sale of impounded stock, after deducting all cost, shall be held in trust for the *bona fide* owners of said stock for thirty days, at the expiration of which time it shall be paid into the treasury of the city. The marshal or police shall be entitled to the following fees: For arrest of cattle, each fifty cents; for arrest of hogs, each twenty-five cents; for feeding cattle, each, per day, twenty cents; for feeding hogs, each, per day, ten cents. Commissions, five per cent. on each sale.

SEC. 218. Any persons assembling and loitering on the streets in sufficient numbers, or in any such manner as to be an obstruction to free passage on the streets, sidewalks or crossings, and failing to disperse upon notification of an officer or member of the police force, or any citizen, shall, on conviction, be punished as prescribed in article 9, section 205, of the ordinances of the city of Dawson.

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SEC. 219. That no barber shops shall be allowed to be opened on the Sabbath day for the purpose of shaving, hair cutting or for any other business in that line in their shops on said day, and any one violating the same shall be punished as prescribed in article 9, section 205, of the ordinances of the city of Dawson.

SEC. 220. Riding velocipedes, bicycles, tricycles or other vehicles

of like character on the sidewalks of the city of Dawson is hereby prohibited on Main street, in the fire limits, and on Lee street to Stonewall street, corner of M. Jennings' store house. Any person violating this section shall be fined in a sum not exceeding ten dollars. Nor shall it be lawful for any person or persons to run any wheelbarrow, hand-cart or wagon in the above prescribed limits.

SEC. 221. Any person who shall violate the statutes of Georgia, now in force, relative to carrying about his or her person any deadly weapon mentioned in said statutes, within the corporate limits of the city of Dawson, shall, for each offence, or proof thereof before the mayor, or mayor and council of said city, be punished as per section 186, article 9, city ordinances of Dawson.

SEC. 222. Any one carrying or leaving any dead carcass near the residence of any citizen of Dawson, so as to be offensive, shall be dealt with at the discretion of the mayor, according to provisions set forth in section 205, article 9, ordinances of city — Dawson.

SEC. 223. Any person found drunk on the streets, alleys, or anywhere in the city, whether disorderly or not, if so intoxicated as to interfere in any way with any one, shall be confined in the guard house by the marshal or policemen until sober, and then brought before the mayor for trial, and, on conviction, be sentenced to the chain-gang from one to twenty days at discretion of the mayor, and be released by paying from one to twenty dollars.

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SEC. 224. No flying jenny shall be run or operated in the fire limits of the city of Dawson without the unanimous consent of the city council. Any one violating this ordinance will be punished as prescribed in article 9, section 205, of the city ordinance.

SEC. 225. No guano or commercial fertilizers shall be stored in the fire limits of said city, and that no warehouse or storage company be allowed to charge more than twenty-five cents per ton for storage and handling the same. Any one violating this ordinance shall be punished as prescribed in section 205, article 9, of the city ordinances of Dawson.

SEC. 226. It shall be considered disorderly conduct for any person or persons to play or throw balls or rocks in the fire limits in the city of Dawson in front of any private residence, except by consent of owner, and any one violating said ordinance shall be fined or imprisoned at discretion of the mayor.

SEC. 227. Any person or persons jumping off or on a moving train at the depot in the city of Dawson, charges for the same having been made by the railroad officials, shall be deemed guilty of disorderly conduct and be confined or imprisoned at discretion of the mayor.

SEC. 228. It shall not be lawful for any person or persons to drive any goat attached to a wagon within the incorporate limits of the city of Dawson. Any person or persons violating the provisions of this section shall, on conviction, be fined not exceeding five dollars and costs, or be imprisoned in the guard house or work on the streets not exceeding ten days.

SEC. 229. Any person or persons who shall, by washing ice or

anything else in the fountains or hydrants of the city, or interfering with them in any way, shall be deemed guilty of disorderly conduct, and shall be punished as prescribed in section 205, article 9, ordinances city of Dawson.

SEC. 230. Any person or persons who shall be guilty of throwing water from the hydrant or steel sprinklers, upon any person or persons, or horse or mule intentionally, shall be deemed guilty of disorderly conduct, and shall be punished as prescribed in section 205, article 9, of the city ordinances of Dawson.

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ARTICLE X.

CHAPTER XXIII.

Water Works—Contract.

SEC. 231. The city council of the city of Dawson, Georgia, do hereby grant to R. L. Bennett, of Philadelphia, Pennsylvania, and his associates, their successors and assigns, who are to organize a company to be styled "The Dawson Water Works Company," the exclusive right and privilege for a period of ninety-nine years, of constructing, maintaining and operating a system of water works for the purpose of supplying said city and its inhabitants with water for protection against fire, and for domestic, sanitary and other purposes.

SEC. 232. The said company, for the purpose of constructing, maintaining, operating, extending and repairing said system of water works, shall have the sole and exclusive privilege, and full power, right and authority to lay water pipes and mains along any or all streets and avenues of said city, as the same are now open, or may hereafter be extended, and to that end shall have full right to dig ditches or trenches in the streets of said city of such depth and of such width as may be necessary. Provided, that the city shall not be responsible for any damage occasioned thereby, and that the streets shall not be unreasonably obstructed by such work.

SEC. 233. The said company shall have the right to erect buildings and tanks, lay pipes, and erect any other structures, or make any other improvements which may be necessary for its purposes, on any or all lands owned or controlled by said city, except its public squares.

SEC. 234. The said company and their successors and assigns shall complete and have in operation, within eighteen months from the date of the passage of this ordinance, a complete and thorough system of water works, laying four and eight-tenths (4 and 8-10) miles of pipe, sizes eight, six and four inches in diameter, with a reservoir of not less than forty thousand gallons capacity, and of sufficient height to produce a pressure on the mains such

406 that from any hydrant located on *principle* streets a stream of water will be projected, fifty feet vertically, in still air,

through one hundred feet of fire hose, with a one inch nozzle attached.

The said company and their successors and assigns shall be, and are required, from the completion of their system of water works till their charter shall cease, to furnish a sufficient supply of water for the purposes before and hereafter mentioned, unless prevented by unavoidable and providential causes. In such event they shall be allowed a reasonable time to make repairs, and if, after such reasonable time has been allowed, they should still fail to furnish said supply of water, their franchise from that fact be forfeited.

SEC. 235. The said company shall extend its mains and pipes, enlarge its plant, and generally enlarge its system, from time to time, to meet increasing demands consequent upon the growth of the city.

SEC. 236. The city of Dawson, in consideration of said company guaranteeing to it, for the period of twenty years, and as long thereafter as the said company, its successors and assigns, shall continue to operate water works, a free and unrestricted use of its water, in case of fire, and for protection against conflagration, and agreeing to establish at convenient places along the line of its mains, fire plugs of approved pattern, not to exceed fifty in all, until the corporate limits of said city are extended and the population of said city increases so that there are five hundred persons living in said extension, after which they shall be increased proportionately if required. And, as an additional fire protection, also to furnish water to fill the present public cisterns if needed, the said water to be used exclusively for fire purposes only, and the said water to remain the property of the said company except in case of fire, hereby obligates itself to pay to the said company, or to such trust company as the Dawson water works may elect, or decide upon as their trustees for their bonds, the sum of two thousand dollars annually for twenty years, in semi-annual payments of one thousand dollars each, on the first day of January and July of each year.

407 The first payment to be made on such of said days as occur after the completion of said works as provided in section 234 of this ordinance; and, in case said city shall not have sufficient funds at any of such times to make said payments, or, for any cause, does not pay said money at times fixed as aforesaid, then, in that case, warrants shall be issued on the city treasurer, in favor of said company, for the amount due.

SEC. 237. The council shall, and they are hereby required, to make provision, each year, for the payment of two thousand dollars, as provided in the foregoing section, by levying a tax sufficient for that purpose, upon the taxable property of the city.

SEC. 238. Said company, its successors and assigns, shall have the right to make reasonable rates and regulations for the government of private consumers in the use of its water; and to charge such rates for its use as it may from time to time establish. Provided,

the rates charged per annum shall not exceed those named in the following schedule.

Dwellings, single -piggots, for domestic use only	$12.00
Bath tub in addition	8.00
Water closets	8.00
Wash basins	4.00
Urinals	4.00
Yard sprinklers, with fifty feet of hose and ¼ of inch nozzle, in use not more than two hours per day	12.00
Academies and schools, double rates.	
Boarding houses, double private rates	24.00
Bar rooms	24.00
Bar room and restaurant	36.00
Bakeries and barber shops	24.00
Druggists, with soda fountains	24.00
Fountains	$12.00 to 50.00
Livery stables	$25.00 to 50.00
Offices, single rooms	6.00
Photograph galleries	24.00
Stores, same as dwellings per fixture. Steam engines, per horse power	5.00

Hotels, mills, manufacturies and other large consumers, by metre or private rates. Metre rates, per 100 cubic feet, 25 cents; building, laying brick, per thousand, 10 cents; plastering per hundred yards, 50 cents.

408 SEC. 239. That in consideration of the said company agreeing to furnish water to the public municipal buildings, and further agreeing to furnish water to two public fountains of ½ inch nozzle each, the City of Dawson hereby obligates itself to remit to said company, its successors and assigns, any and all license fees, taxes, dues and charges which may at any time hereafter be levied on, assessed by said city against said company, or upon the plant to be used in said water works system.

SEC. 240. That full assent is hereby given to a charter to be granted by the legislature of the State of Georgia, to the said R. L. Bennett and associates, their successors and assigns, or to be obtained by them, under the general incorporation laws of said State incorporating them, into a body corporate, under the title of the Dawson Water Works Company, and granting to said company the exclusive right to contract, *tract*, maintain and operate a system of water works in said city of Dawson, for the purpose of supplying said city, its inhabitants, citizens, residents, with water for protection against fire, and for domestic, sanitary and other useful purposes, and to make such reasonable rates and regulations for the government of private consumers in the price of water, and to charge such rates therefor as the said company may determine upon. Provided, the rates do not exceed those established by this ordinance.

SEC. 241. The provisions of this ordinance shall be mutually binding upon the City of Dawson and R. L. Bennett and associates, and the company to be organized by them, in pursuance of the provisions thereof, and it shall have the force and effect of a contract between the respective parties, as fully and completely as if it were drawn in that form and signed by the contracting parties.

Confirmed at regular meeting city council of Dawson, February 21st, 1890.

CHAPTER XXIV.

SEC. 242. It shall be the duty of the mayor to appoint three members of the city council whose duty it shall be to superintend
409 the water works and water supplies of the city of Dawson; to see that the owners of said water works company comply with their obligations in furnishing water to said city and private individuals, and not to extort in their prices for water, and to permit the owners of said water works to lay pipes and mains in the streets and alleys with the understanding that no vested rights are to accure to them, and that pipes and mains are to be removed by the parties whenever required to do so by said city, and if they fail to comply the city shall have the right to remove them at the expense of parties owning or laying them.

CHAPTER XXV.

For Protection Water Supply of Dawson.

An act to protect the water supply of the water works of the city of Dawson, and providing police protection, and for other purposes.

SEC. 244. *Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same,* That from and after the passage of this act, it shall be unlawful to obstruct, divert, dam up, or in any way to interfere with the free passage or flow of the stream from which the water supply is obtained for the water works in said city of Dawson, said stream being known as the "Little Chickasawhatchee or Town creek." It shall also be unlawful for any person to pollute or contaminate, in any way or by any means, the waters of said streams, or any of the springs or branches which supply it, so as to effect in any degree the quality or purity of the water furnished to said city or its inhabitants by said water works.

SEC. 245. *Be it further enacted,* That it shall be unlawful for any person to place or deposit any dead animal, offal, decayed vegetables or fruit, or any kind of filth in the swamp bordering on and surrounding said stream and the springs and branches which supply it, so as to effect the purity or quality of the water which may be furnished by and through said water works.

SEC. 246. Be it further enacted, That any person violating any of

the provisions of the two preceding sections, or doing any of the acts therein declared to be unlawful, shall be guilty of a misde-
410 meanor, and on conviction thereof shall be punished as prescribed in section 4310 of the Code of Georgia of 1882.

SEC. 247. *Be it further enacted*, That the police supervision of the marshal and policemen of said city of Dawson shall extend over the territory embraced and designated in the first and second section- of this act, and such officers are hereby empowered to arrest any persons violating any of the provisions of this act.

SEC. 248. *Be it further enacted*, That nothing in this act contained is intended or shall be construed to prevent or interfere with the construction and maintenance of any dam, levee or ditch by the agents or employés of the company constructing or operating the said water works, so as to afford a sufficient head of water to supply said city and the persons using the water furnished by said company.

SEC. 249. *Be it further enacted*, That all laws and parts of laws in conflict with this act be, and the same are, hereby repealed.

Approved September 7th, 1891.

ARTICLE XI.

CHAPTER XXVI.

The Mayor's Court.

SEC. 250. It shall be the duty of the mayor (and in his absence or illness, the mayor *pro tem.*) to hold a court, to be called the "mayor's court," at any time he may appoint, said court to be held in the council chamber of this city, for the trial of all offenders against the laws and ordinances of this city, and he is fully authorized and empowered to inflict such fines and penalties upon offenders as he may deem proper in accordance with the penalties attached to the particular offense tried, to punish witnesses for non-attendance, and persons for contempt.

SEC. 251. The clerk of the city council shall be the clerk of the mayor's court, and shall have and keep a regular docket, upon which he shall enter all cases brought before the mayor's court for investigation and trial, together with the judgment of
411 the court in each case, and shall enter thereon the date of execution and the date of delivering the same to the marshal, and shall record thereon the date of collection of fine and amount collected.

SEC. 252. The clerk of said court shall, before 10 o'clock a. m., after the confinement of any party or parties in the guard house, enter on the docket of said court the names of all persons confined in the guard house, together with the charges against them, and all such cases shall be tried in twenty-four hours after confinement, except for providential cause, or in cases of continuance granted by the court.

SEC. 253. Every person charged with any offense against the laws and ordinances of this city, except when provision is made for his or her immediate arrest, shall be summoned in writing to appear and answer before the mayor's court. Said summons shall distinctly state the offense charged and the time and place of trial, and be served in person by the marshal or any policeman of said city. When such party so summoned shall fail or refuse to appear, he or she shall be immediately arrested and brought before the mayor's court for trial.

SEC. 254. Subpenas for witnesses shall be issued by the clerk and signed by him, and the mayor, or mayor *pro tem.*, shall have power to compel their attendance.

SEC. 255. The mayor, or mayor *pro tem.*, for good and sufficient cause shown, has power and authority to continue any case in his court to such time as the ends of justice may require.

SEC. 256. When any fine or sentence shall be imposed by the mayor, or mayor *pro tem.*, under any section of these ordinances, he shall have full power and authority to sentence the offender to labor on the city chain-gang for such time as the ordinance allows, to be released therefrom upon the payment of the fine and all costs.

SEC. 257. In all cases where the punishment is not fixed by special act in these ordinances, and the actor's acts are prohibited, the mayor shall have power to punish by imprisonment at labor in the city chain-gang for a time not longer than forty days nor less than
412 ten days, to be discharged from such imprisonment and labor by paying a fine of not more than sixty or less than twenty dollars and all costs.

SEC. 258. Persons convicted in the mayor's court of any offense against the laws and ordinances of this city, shall pay all costs, unless it is otherwise ordered by the officer trying the case.

SEC. 259. If, after investigating any case, by the mayor it shall appear that the mayor's court has no jurisdiction to hear and punish the offender, it shall be his duty to commit the prisoner to jail, or bind him over in a suitable bond for his appearance at the next term of the court having jurisdiction of the case as hereinbefore provided.

SEC. 260. Any defendant who may consider himself or herself aggrieved by the judgment and sentence of the mayor, shall have the right to appeal from his decision and judgment to the city council at its next regular session and not afterwards. Before the appeal shall be entered the defendant shall give bond with good security, to be approved by the mayor, in such sum as he may require, payable to the mayor and city council, and conditioned for his or her appearance before the council and for the payment of the fine imposed by the city council and all costs. Nothing herein contained shall prevent the city council from increasing the fine, or other punishment, originally imposed, not exceeding the limits prescribed in these laws and ordinances for the punishment of such

offenses, if, in their judgment, the ends of justice would thereby be promoted.

SEC. 261. All cases heard or tried by the city council shall be by them tried under their oaths of office.

ARTICLE XII.

CHAPTER XXVII.

Public Weigher of Cotton and Other Produce.

SEC. 262. At the first meeting of the city council of Dawson, after their installation, or as soon thereafter as practicable, there shall be elected by them under the same rules governing the election
413 of other city officers, a public weigher of cotton and other produce, who, before entering upon the discharge of his duties, shall give an acceptable bond in the sum of five hundred dollars, payable to the mayor and city council of Dawson, conditioned upon the faithful performance of his duties as public weigher, and shall take and subscribe the following oath:

"I, —— ——, do solemnly swear that I will justly, impartially and without deduction weigh all such cotton and all other articles of produce disposed of by weight that may be shown me for that purpose, and tender a true account thereof to the party concerned, if so required."

The weigher may, nevertheless, make such deductions for wet or other cause as may be reasonable when the seller or his agent shall thereto consent.

SEC. 263. It shall be the duty of said public weigher, in all cases of disagreement between seller and buyer, to weigh all cotton and other produce sold by weight, when requested to do so, and give his certificate for the same; and shall receive as a compensation for his services eight cents per bale for all cotton weighed by him for the first time and five cents per bale on all cotton reweighed by him. On all other produce twenty-five cents per load, or fractional parts thereof, said charges to be paid by the buyer.

SEC. 264. No person shall, for money or any other valuable consideration, or by employment, as a hired clerk, or by agreement between buyer and seller of cotton, or in any other capacity or manner, act as or perform the duties of public weigher, or in any capacity weigh cotton, or other produce, in the corporate limits of the city of Dawson, who has not been legally elected to the office of public weigher by the city council, and filed his official oath and bond as required by the laws of the city. Any person who violates the provisions of this section shall, on conviction, be fined not less than five nor more than fifty dollars, or confined in the guard house, or both, in the discretion of the mayor. Provided, that no part of this sec-

tion shall be construed or apply to any regular employed
414 weigher of any of the various warehouses or public gins of the city, weighing cotton or other articles for storage in the same.

Done at regular meeting city council of Dawson August 3rd, 1891.

Article XIII.

Chapter XXVIII.

Public School System for Dawson.

An act to establish a system of public graded schools in the city of Dawson, and for other purposes.

Sec. 265. *Be it enacted by the General Assembly of Georgia, the corporate authorities of the city of Dawson having so recommended*, That there shall be established in the city of Dawson, county of Terrell, a system of public schools, to be established, conducted and maintained as hereinafter prescribed.

Sec. 266. *Be it further enacted*, That before this act shall take effect, and be of force in said city of Dawson, the mayor of said city shall order an election, giving at least twenty days' notice by publication in one or both of the newspapers published in said city, to ascertain the will of the qualified voters, under this act, whether a system of public graded schools be established or not in said city. All persons voting at said election shall have written or printed on their ballots the words: "For public schools," or "Against public schools."

Should the question be decided in favor of public schools by a two-thirds vote of persons qualified to vote at said election, it shall be the duty of the mayor and council of said city so to declare, and proceed to levy and collect the tax hereinafter provided for in this act; but should said question be decided against public schools, said mayor is authorized to order other elections upon the same question, when as many as twenty-five legal voters shall by petition so request. Provided, twelve months shall elapse between said elections. The first election under this act shall be ordered by the mayor before the first day of April, 1890. Any election held under this act shall be governed by the same rules and regulations as elections held for mayor and aldermen of the city of Dawson.

415 Sec. 267. *Be it further enacted*, That within twenty days from the passage of this act by the General Assembly, the mayor of the city of Dawson shall call a meeting of the council and the board of trustees of the South Georgia male and female college, and these two bodies together shall proceed to elect twelve suitable persons to act as a board of school commissioners for said public schools, with perpetual succession, who shall hold their offices until

their successors shall be elected and qualified as hereinafter provided; and these persons, so elected, shall constitute the first board of commissioners, to act whenever said act shall be ratified by the necessary constitutional majority of the voters of said city. They and their successors in office shall have power to take and hold all property, personal and real, that they may require by purchase, donation or otherwise, in trust for said city of Dawson, with the right to sue and the liability of being sued.

SEC. 268. *Be it further enacted*, That said board of school commissioners shall elect a president, vice-president, secretary and treasurer from their own number, who shall perform such duties as may be required of them.

The treasurer shall give bond in such sum as they may determine, conditioned for the safe-keeping and proper disbursement of the funds placed in his hands. Said school commissioners shall divide themselves, by ballot or otherwise, into four classes. The term of office of the first class shall expire at the end of two years after this act goes into effect; that of the second at the end of four years; that of the third at the end of six years; that of the fourth at the end of eight years.

If vacancies occur by resignation or otherwise before the expiration of any term, said board shall fill such vacancy by appointment for the remainder of the term.

As the terms of office of the present board expire two members shall be elected by the remaining members of the board and one by the mayor and city council of Dawson, and the terms of office of said members so elected shall be eight years, and until their successors are elected in the manner before mentioned. The
416 members of said board shall be male citizens of Dawson, twenty-one years of age, and of good moral character.

SEC. 269. *Be it further enacted*, That said board of school commissioners shall elect a superintendent (who may be principal), principals and other teachers for said public schools, prescribe their duties and their salaries, elect text books, prescribe the course of study, determine the length of the scholastic term and the time of beginning and closing said school, (the term not to be less than those of the State public schools), and adopt such rules and regulations for their own government, and that of the schools, as they may deem necessary for the carrying out of the purposes of this act, not inconsistent with the constitution and laws of this State.

The said board shall establish such grammar schools and such high schools as may be necessary for the education of the children attending said schools.

They may charge a matriculation fee not to exceed five dollars per annum for the admission of children into said schools, and no pupil shall be entitled to the benefits of this act, or enter or continue in said schools, without complying with this provision.

They shall provide for the admission of children to said schools who reside out of said city, or students not within the ages of six

and eighteen years of age upon the payment of such tuition as they may deem proper.

They shall have power to build, purchase, lease and rent such school houses and other property as may be necessary to carry on said schools.

A majority of said board shall constitute a quorum for the transaction of any business.

SEC. 270. *Be it further enacted*, That no children shall be recipients of the benefits of said public schools whose parents, guardians or natural protectors are not actual residents of the city of Dawson for six months preceding the time of their application for admission into said schools, and whose parents have not paid the taxes assessed under the school law.

But this section shall not be construed to exclude from said
417 public schools the children of any parent or guardian, though non-resident, who is, at the time of application for admission, the *bona fide* owner, in fee simple, of real estate in said city of the value of one thousand dollars, by corporation assessment.

The six months' residence, required for the admission of children to said schools, shall not apply to persons who become *bona fide* residents of Dawson, and owners of real estate in said city to the value of five hundred dollars, by city assessment.

SEC. 271. *Be it further enacted*, That said board of school commissioners shall provide separate schools for the white and colored children of said city if public schools are established under this act.

SEC. 272. *Be it further enacted*, That said board of school commissioners shall determine, as early as practicable after the beginning of each scholastic year, what amount of money it will be necessary to raise by taxation to defray the expenses of said public schools for the ensuing year, and shall lay the same before the mayor and council of said city; and it shall be the duty of said mayor and council to proceed to levy and collect the same; provided, the rate of taxation, under this act, shall not exceed five-tenths (5-10) of one per cent. per annum; and when collected the clerk, or other collecting officer of said council, shall pay the same over to the treasurer of said board of school commissioners, which shall constitute a fund to be expended by said board in the payment of salaries of the principal and teachers, and in building, repairing, leasing or renting school houses and other property, and for defraying all other necessary expenses of said schools; and the collection of the tax provided for by this section may be enforced by mandamus against the mayor and council of said city at the instance of the said board of school commissioners.

SEC. 273. *Be it further enacted*, That the county school commissioners, of the county of Terrell, shall pay over to the treasurer of said board of school commissioners, the *pro rata* share of the State and county school fund coming to said city, to be, by them, expended in the maintenance of said public schools.

The board of public commissioners, created by this act, shall re-

quire the teachers of said public schools to make out reports
418 of the attendance of children entitled to draw the State school fund, and the same shall be filed with the county school commissioner, so that the amount due said city may be estimated.

SEC. 274. *Be it further enacted*, That the mayor and council of said city shall have power to appropriate, from time to time, such sums of money for the purpose of building or purchasing school houses and other school property for the use of the public schools, herein provided for, as the condition of the treasury may authorize.

SEC. 275. *Be it further enacted*, That all laws and parts of laws in conflict with this act be, and the same are, hereby repealed.

Approved Oct. 16th, 1889.

ARTICLE XIV.

CHAPTER XXIX.

Public Buildings.

SEC. 276. It shall be the duty of the mayor of said city to appoint a committee of three or more members of the city council of Dawson, whose duty it shall be to superintend the erection and improvement of all public buildings of said city, with, and by, the direction of said city council, and to over-look all public improvements, and prevent any encroachment or injury to the public buildings or streets of said city. Any person wishing to make any improvements of private property, likely to depreciate the value or usefulness of said public property, must first get permission from said committee before commencing to build or erect said private improvements, and any one violating this ordinance shall be punished as prescribed in section 205, article 9, of the city ordinances.

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ARTICLE XV.

CHAPTER XXX.

Railroads.

SEC. 277. Permission is hereby granted to the Columbus Railway Company to construct its railway along and across such of the streets and alleys of the city of Dawson as it may be necessary for said railroad, in the opinion of its engineers, to cross or to run along, and a right of way to said railroad is herein granted and confirmed to enter, cross and run along said streets and alleys, and to construct such side-tracks, switches and turn-outs, as may be necessary.

SEC. 278. A right of way, according to the located line of said railroad, is hereby granted and confirmed to said company over and

across and on any land now or hereafter belonging to the said city of Dawson, and the mayor and council are authorized and hereby empowered to convey a right of way across said land, now or hereafter owned by the city of Dawson, and to sign a deed or deeds therefor to said company.

Any person or persons violating the provisions of this ordinance shall be subject to a fine, each of not exceeding one hundred dollars and not less than ten dollars, at the discretion of the mayor.

SEC. 279. It shall not be lawful for any railroad company, running trains through the city of Dawson, to blockade any crossing or street, or any part thereof, longer than eight minutes at any one time. For any violation of this ordinance, by any engineer or conductor in charge of any railroad company, shall be subject to a penalty of not less than five nor more than fifteen dollars, or confinement in the guard house for not less than five nor more than ten days, at the discretion of the mayor.

SEC. 280. It shall not be lawful for any engineer or conductor, or other person or persons to run any engine, car or cars on a railroad within the corporate limits of the city of Dawson, faster than at the rate of four miles per hour in passing over any public crossing or street.

SEC. 281. No engineer or conductor, on any railroad in the
420 incorporate limits of the city of Dawson, shall allow his engine or train to run or be run at a rate of more than four miles an hour in front of or near any college or school house in said city without having a flagman walking in front of each train from 6 o'clock, a. m., and 5 o'clock, p. m.; and any conductor or engineer, violating the above, shall be fined or imprisoned, or both, at the discretion of the mayor, in a sum not to exceed fifty dollars, or imprisonment not to exceed twenty days.

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426 *Record of Proceedings Before Special Master.*

In the Circuit Court of the United States for the Western Division of the Northern District of Georgia.

THE COLUMBIA AVENUE SAVINGS FUND, SAFE Deposit, Title & Trust Company *vs.* THE CITY OF DAWSON, W. B. CHEATHAM, J. G. Dean, J. S. Lowrey, Charles Deubler, F. M. Jennings, F. Nasworthy, F. M. McNulty, A. J. Baldwin, John Seay, and The Dawson Water Works Company.	In Equity.	No. 44.

Testimony and proceedings taken down before Hon. William A. Wimbish, master, at Dawson, Ga., March 10, 11, 12, and 13, 1902, and Philadelphia, Pa., March 31, 1902.

Appearances.

For the complainant: J. G. Parks and Hall & Wimberly.
For the repondents: Guerry & Hall, and J. A. Laing.
Geo. C. Palmer, stenographer.

Mr. WIMBERLY: I suppose the documents once introduced in evidence, we can offer the same ones by specifying them in the printed record?

The MASTER: Under the equity rule, all documents and affidavits used on the hearing for injunction, are before the master to be considered by him; and they may be specified or amplified.

Mr. WIMBERLY: I didn't hear your honor's ruling?

The MASTER: Under the equity rule, the record, including the documentary evidence and all other papers introduced on the hearing for injunction, are before the master without formal introduction.

427 Mr. GUERRY: Does that include the affidavits?

The MASTER: Only for what they are worth. Not as evidence.

Mr. GUERRY: There were a good many affidavits. Has your honor the original papers in this case?

The MASTER: They are with the clerk at Columbus. I have been relying upon this printed record.

Mr. GUERRY: We will want the record. One part of the record we could not get along without; and I will ask your honor to wire for it. We have attached to our answer an exemplified copy of a record of the supreme court of Georgia that we rely upon. In getting up the record we dispensed with that part of it, and provided

as a substitute the case as appears in the supreme court reports. There is a certified copy that we are bound to introduce in evidence in this case.

Mr. WIMBISH: You can specify that evidence.

Mr. WIMBERLY: You can regularly tender it when you reach it here and we can have the right to object to it.

Mr. GUERRY: It is not here for us to offer.

Mr. WIMBERLY: You can regularly tender it when you reach it; and we can have the right to object to it. Don't think we will need it in order to make our objection. Don't care to have it physically in court. What I wanted it should be tendered in such a way that we can put in any objection we may see fit to make without its being here.

Mr. GUERRY: We don't need it unless they should demand it.

Documentary Evidence Tendered in Evidence by the Complainant.

Mr. WIMBERLY: We tender in evidence the charter of the complainant company, The Columbia Avenue Savings Fund, Safe Deposit, Title and Trust Company, found on pages 75 to 79 inclusive, as follows:

428 "*Charter of the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company.*

To his excellency Robert E. Pattison, governor of Pennsylvania.

SIR: In compliance with the requirements of an act of the General Assembly of the Commonwealth of Pennsylvania, entitled "An act to provide for the incorporation and regulation of certain corporations," approved the twenty-ninth day of April, 1874, and its supplements, the undersigned all of whom are citizens of Pennsylvania, having associated themselves together for the purposes hereinafter mentioned, and desiring that they may be incorporated, and that letters patent may issue to them, and their successors according to law, do hereby certify:

I. The name of the proposed corporation is "The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company."

II. The said corporation is formed for the purpose of insuring owners of real estate, mortgages and others interested in real estate from loss by reason of defective titles, liens and incumbrances; of receiving and holding on deposit, and in trust and as security, estates, real and personal, including the notes, bonds and obligations of States, individuals, companies and corporations and the same to purchase, collect, adjust and settle, sell and dispose of in any manner without proceedings in law or equity and for such price and on such terms as may be agreed on between said corporation and the contracting parties; of making insurance for the fidelity of persons

holding places of responsibility and trust; of receiving upon deposit for safe keeping money, jewelry, plate, stocks, bonds and valuable property of every description upon such terms as may be
429 agreed upon; of acting as assignees, receivers, guardians, executors and administrators; of executing trusts of every description not inconsistent with the laws of the State of Pennsylvania, or of the United States of America; of acting as agents for the purpose of issuing and countersigning the certificates of stock, bonds or other obligations of any corporation, association, municipality or State or public authority and receiving and managing any sinking fund thereof on such terms as may be agreed upon; of becoming sole security or surety in any case where by law one or more securities may be required for the faithful performance of any trust or office; of taking, receiving and holding any and all such pieces of real property as may have been the subject of any insurance by such corporation under the powers conferred by this charter and the same to convey and dispose of in such manner as said corporation may see proper.

III. The business of said corporation is to be transacted in the city of Philadelphia and State of Pennsylvania.

IV. The said corporation is to exist perpetually.

V. The names and residences of the subscribers and the number of shares subscribed by each, are as follows:

Name.	Residence.	No. of shares.
George S. Graham	No. 1538 N. Broad St. Phila.	Fifty "
Edwin F. Glenn	No. 2220 Fairm't Ave. Phila.	Fifty shares.
Edward A. Murphy	No. 1915 No. 11th St. Phila.	One hundred.
Barclay J. Woodward	No. 2001 N. 13th St., Phila.	One hundred.
James Strong	No. 1430 No. 18th St., Phila.	One hundred.
John K. Cumming	No. 1623 Columbia Ave. Phila	One hundred.
Charles Class	No. 1732 Mervine St., Phila	One hundred.
Josiah B. Seybert	No. 1808 N. Broad St. Phila.	One hundred.
Robert U. Jacob	No. 1814 N. Broad St., Phila.	One hundred.
William S. Thomas	No. 1641 N. Broad St., Phila.	One hundred.
Edward Foerderer	No. 1712 Randolph St., Phila.	One hundred.
430 Ferdinand Schuman	No. 1804 N. 8th St., Phila.	One hundred.
Charles Wolters	Cor. of 11th and Oxford, Phila	One hundred.
Charles H. Elliott	No. 138 S. 3rd St., Phila.	One hundred.
James A. Hayes	No. 2038 N. 12th St. Phila.	One hundred.
Karl Hutter	New York city, N. Y.	One hundred.
Henry C. Louchiem	No. 711 N. 6th St., Phila.	One hundred.
Benjamin F. Houseman	No. 2012 N. 6th St., Phila.	One hundred.
Edwin F. Partridge	No. 2027 Arch St., Phila.	One hundred.
Charles G. Henderson Jr.	No. 1427 Columbia Ave. Pa.	One hundred.
Charles J. Taylor	No. 1706 N. 8th St., Phila.	One hundred.
John H. Hudson	No. 1427 Columbia Ave, Phila.	One hundred.
Sylvanus A. Leith	No. 1708 N. 13th St. Phila	One hundred.
John Middleton	No. 1910 N. 11th St., Phila	One hundred.
Richard H. Rushton	No. 2014 N. 12th St. Phila.	One hundred.
Wilfred H. Harned	No. 4027 Walnut St., Phila.	One hundred.

VI. The number of directors of said corporation is fixed at seven and the names and residences of the directors who are chosen for the first year are as follows:

Names.	Residence.
George S. Graham	No. 1538 N. Broad St., Phila.
Barclay J. Woodward	No. 2001 N. 13th St., Phila.
James Strong	No. 1430 N. 18th St., Phila.
John K. Cuming	No. 1623 Columbia Ave., Phila.
Robert U. Jacob	No. 1814 N. Broad St., Phila.
James A. Hayes	No. 2038 N. 12th St., Phila.
John Middleton	No. 1910 N. 11th St., Phila.

VII. The amount of capital stock of said corporation is two hundred and fifty thousand dollars, divided into twenty five hundred shares of the par value of one hundred dollars, and twenty-five thousand dollars, being ten per centum of the capital stock,
431 has been paid in cash to the treasurer of said corporation, whose name- and residence- are:

Walter Scott, 1728 Willington street, Philadelphia.

JOHN K. CUMING. [SEAL.]
BARCLAY J. WOODWARD. [SEAL.]
CHARLES H. ELLIOTT. [SEAL.]
EDWIN F. GLENN. [SEAL.]
SYLVANUS A. LEITH. [SEAL.]
JAMES STRONG. [SEAL.]

STATE OF PENNSYLVANIA, } ss:
County of Philadelphia, }

Personally appeared before me this 16th day of December, A. D. 1886, John K. Cuming, Barclay J. Woodward and Charles H. Elliot who being duly sworn according to law depose and say that the statements contained in the foregoing instrument are true.

JOHN K. CUMING.
BARCLAY J. WOODWARD.
CHARLES H. ELLIOT.

Sworn to and subscribed before me this 16th day of December A. D. 1886.

JOS. K. FLESCHER,
Deputy Recorder.

[SEAL.]

EXECUTIVE CHAMBER,
HARRISBURG, *Dec.* 20, 1886.

Hon. W. S. Stenger, secretary of the Commonwealth:

Having examined the foregoing application and found it to be in proper form, and within the purposes of the class of corporations

specified in section two of the act, entitled "An act to provide for the incorporation and regulation of certain corporations," approved April 29th 1874, I hereby approve the same, and direct that
432 letters patent issue according to law.

ROB'T. E. PATTISON, *Governor.*

SECRETARY'S OFFICE, *Pennsylvania,* } ss:

Enrolled in Charter Book No. 23, page 196. Witness my hand and seal of office at Harrisburg this 20 day of December, A. D. 1886.

W. S. STENGER,
Secretary of the Commonwealth.

[SEAL.]

Recorded in the office for recording of deeds, etc., in and for the county of Philadelphia in Charter Book No. 12, page 10, etc.

Witness my hand and seal of office, this seventh day of January, anno Domini, 1897.

GEO. G. RUIL,
Recorder of Deeds.

[SEAL.]

Mr. WIMBERLY: I now offer next the contract between the city of Dawson and the Dawson Water Works Company, in the form of an ordinance, found in the printed record, pages 79 to 82 inclusive; and in connection therewith (the original being pasted or attached thereto), the assignment of that contract by R. L. Bennett, through Charles H. Bennett, attorney for R. L. Bennett, *et al.*, to the American Pipe Manufacturing Co. Also in connection therewith an agreement to transfer the rights of that contract to the corporation to be organized and styled "The Dawson Water Works Co." found on page 83. That is also signed by Chas. H. Bennett, attorney in fact. Also in connection therewith power of attorney from R. L. Bennett to Chas. H. Bennett, constituting him his attorney in fact for the purpose of making the transfer. That is found on page 83. And in connection therewith, also attached to same papers, the assign-
ment of the contract by the American Pipe Mfg. Co. to the
433 Dawson Water Works Co. dated 20 August, 1891. And in connection therewith the acknowledgement on page 84. That is recorded in the clerk's office, superior court, recorded in Book N. page- 655 to 659, 26th day of Aug. 1891. F. W. Clark, clerk.

In connection with that we offer the minutes——

The MASTER: Are they in the record?

Mr. WIMBERLY: I don't know that they are specified in the printed record, that is, a transcript of these minutes of February 21, because we never had a copy of them. We can tender the book or by agreement we can have a copy made from the book.

The MASTER: As I understand, that is original evidence? Am I correct?

Mr. WIMBERLY: That is all right. I see the contract is duly certified under the seal of the city. That will be enough. That will dispose of bringing the book over.

The MASTER: That is the contract?

Mr. WIMBERLY: Yes, in the form of an ordinance.

Mr. GUERRY: Action of council?

Mr. WIMBERLY: The action of council.

(Documentary evidence offered as above is as follows)

"*Ordinance of February* 21, 1890—*Contract between the City of Dawson and Dawson Water Works Company.*

An ordinance to grant to R. L. Bennett and associates, their successors and assigns, who are to organize a corporation to be styled the Dawson Water Works Company, the exclusive privilege of constructing, maintaining, and operating a system of waterworks in the city of Dawson, Georgia.

Be it ordained by the city council of the city of Dawson, as follows:

SEC. 1. That the city council of the city of Dawson,
434 Georgia, do hereby grant to R. L. Bennett, of Philadelphia, Pennsylvania, and his associates, their successors and assigns, who are to organize a company to be styled the Dawson Water Works Company, the exclusive right and privilege for the period of (99) ninety-nine years, of constructing, maintaining and operating a system of waterworks for the purpose of supplying said city and its inhabitants with water for protection against fire and for domestic, sanitary and other useful purposes.

SEC. 2. That the said company for the purpose of constructing, maintaining, operating, extending and repairing said system of waterworks shall have the sole and exclusive privilege and full power, right and authority to lay waterpipes and mains along any and all the streets and avenues of said city, as the same are now open or may hereafter be extended, and to that end, shall have full right to dig ditches or trenches in the streets of said city to such depth and of such width as may be necessary, provided, that the city shall not be responsible for any damage occasioned thereby, and that the streets shall not be unreasonably obstructed by such work.

SEC. 3. That the said company shall have the right to erect buildings and tanks, lay pipes and erect any other structures or make any other improvements which may be necessary for its purposes, on any or all lands owned or controlled by said city, except its public squares.

SEC. 4. That the said company and their successors and assigns shall complete and have in operation within 18 months from the date and passage of this ordinance a complete and thorough system of waterworks, laying four (4 8/10) miles of pipe, sizes (8, 6 and 4)

eight, six and four inches diameter with a reservoir with not less than (40,000) forty thousand gallons capacity, and of a sufficient height to produce a pressure on the mains such that from any hydrant located on the principal streets, a stream of water will be projected fifty (50) feet vertically in still air through one hundred feet of fire hose with a one inch nozzle attached. The said company and their successors and assigns, shall be and are required from the completion of their system of waterworks, until their charter shall cease, to furnish a sufficient supply of water for the purposes before and hereinafter mentioned, unless prevented by unavoidable and providential causes, in such event they shall be allowed a reasonable time to make repairs, and if after such reasonable time has been allowed they should still fail to furnish said supply of water, their franchise from that fact be forfeited.

SEC. 5. That the said company shall extend its mains and pipes, enlarge its plant and generally enlarge its system from time to time to meet increasing demands consequent upon the growth of the city.

SEC. 6. That the said City of Dawson, in consideration of said company guaranteeing to it for the period of twenty (20) years, and as long thereafter as the said company, its successors and assigns, shall continue to operate said waterworks, a free and unrestricted use of its water in case of fire and for protection against conflagration, and agreeing to establish at convenient places along the line of its mains fire plugs of approved pattern not to exceed fifty feet in all, until the corporate limits of the city are extended and the population of said city increases so that there are 500 persons living in the said extension, after which they shall be increased proportionately if required, and as an additional fire protection also to furnish water to fill the present public cisterns if needed, the said water to be used exclusively for fire purposes only, and the said water to remain the property of said company except in case of fire, hereby obligates itself to pay to the said company or to such trust company as the Dawson water works may elect or decide upon as their trustees for their bonds the sum of two thousand 00/100 ($2,000.00) dollars annually for twenty years, in semi-annual payments of one thousand ($1,000) dollars, each, on the first day of January and July of each year, the first payment to be made on such of said days as occurs first after the completion of said works as provided in section (4) of this ordinance; and in case said city shall not have sufficient funds at any of such times to make said payment, or for any cause does not pay said money at the times fixed as aforesaid, then and in that case, warrants shall be issued on the city treasurer in favor of said company for the amounts due.

SEC. 7. That the council shall and they are hereby required to make provisions each year for the payment of the sum of two thousand ($2,000.00) dollars, as provided in the foregoing section by levying a tax sufficient for that purpose upon the taxable property of the city.

SEC. 8. That the said company, its successors and assigns shall have the right to make reasonable rules and regulations for the government of private consumers in the use of its water and to charge such rates for its use as it may from time to time establish, provided, the rate charged per annum shall not exceed those named in the following schedule:

Dwellings, single spigot, for domestic use only, $12.
Bath tub in addition $8.
Water closets, $8.
Wash basins, $4.
Urinals, $4.
Yard sprinklers, with 50 feet of hose and ¼ inch nozzle at-
437 tached, in use not more than two hours per day, $12.
Academies and schools, double private rates.
Boarding houses, double private rates.
Barrooms, $24.
Barrooms and restaurants $36.
Bakeries and barber shops, $24
Druggists with soda fountains, $24.
Fountains $12. to $50.
Livery stables $25. to $50.
Offices, single rooms, $6.
Photograph galleries, $24.
Stores, same as dwellings, per fixture.
Steam engines, per horse power, $5.
Hotels, mills, manufacturies and other large consumers by metre or private rates, metre rates, per 100 cubic feet 25/100.
Building, laying brick, per 1000, 10/100.
Plastering, per 100 yards, 50/100.

SEC. 9. That in consideration of the said company agreeing to furnish water to the public municipal building and further agreeing to furnish water to two public fountains of ⅛ inch nozzle each, the City of Dawson hereby obligates itself to remit to said company, its successors and assigns, any and all license fees, taxes, dues and charges which may at any time hereafter be levied or assessed by said city against said company or upon the plant to be used in said waterworks system.

SEC. 10. That full assent is hereby given to a charter to be granted by the legislature of the State of Georgia, to the said R. L. Bennett
and associates, their successors and assigns, or to be obtained
438 by them under the general incorporation laws of said State, incorporating them into a body corporate under the title of the Dawson Waterworks Company, and granting to said company the exclusive right to construct, maintain and operate a system of waterworks in said city of Dawson, for the purpose of supplying said city, its inhabitants, citizens and residents with water for protection against fire, and for domestic, sanitary and other useful purposes, and to make such reasonable rules and regulations for the government of private consumers in the use of water, and to charge such

rates therefor as the said company may determine upon, provided the rates do not exceed those established as maximum by this ordinance.

SEC. 11. That the provisions of this ordinance shall be mutually binding upon the City of Dawson, and R. L. Bennett and associates, and the company to be organized by them in pursuance of the provisions thereof and it shall have the force and effect of a contract between the respective parties as fully and completely as if it were drawn in that form and signed by the contracting parties.

Unanimously adopted at full meeting of city council of Dawson, February 21, 1890.

W. B. CHEATHAM, *Mayor.*

[SEAL OF CL'K.] J. L. JANES, *Cl'k.*

Assignment to American Pipe Mfg. Co.

PHILADELPHIA, PA., *March* 17, '91.

I hereby sell, transfer and assign, and set over to the American Pipe Manufact'y Co., all rights in and to the within and foregoing franchise from Dawson Ga., for the waterworks Co., for the sum of one dollar and other consideration thereto moving.

CHAS. H. BENNETT,
Att'y for R. L. Bennett et al.

Witness:
JOS. S. KEEN, JR.

439 PHILADELPHIA, *March* 3, '91.

American Pipe Mnfg. Co., Phila.

GENTLEMEN: I hereby agree to sell, assign and transfer to you, an ordinance granted to R. L. Bennett and associates and assigns, by the City of Dawson, Georgia, entitled An ordinance "to grant to R. L. Bennett, and associates, their successors and assigns who are to organize a corporation to be styled the Dawson Waterworks — the exclusive privilege of constructing, maintaining — a system of waterworks in the city of Dawson, Georgia," and dated Dawson, Feb. 21, 1890. Provided you pay me in cash the sum of two hundred dollars on or before the 15th day of March, A. D. 1891.

Yours truly, CHAS. H. BENNETT, *Att'y.*

Power of Attorney from R. L. Bennett to Chas. H. Bennett.

Know all men by these presents, that I, R. L. Bennett, of Philadelphia, Pennsylvania, have made, constituted and appointed, and by these presents do make, constitute and appoint Chas. H. Bennett, of Philadelphia, Pa., my true and lawful attorney for me and in my

name, place and stead, to sell, bargain, lease or transfer all my rights, titles and privileges in and unto an ordinance granted me by the City of Dawson, Georgia, Feb'y 21, 1890, and entitled "An ordinance to grant to R. L. Bennett and associates, their successors and assigns, who are to organize a corporation to be styled the Dawson Water Works Company, the exclusive privilege of constructing, maintaining and operating a system of waterworks in the city of Dawson, Georgia."; giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about
440 the premises as fully to all intents and purposes as I might or could do if personally present, with full power of substitution and revocation. Hereby ratifying and confirming all that my said attorney or his substitute shall lawfully do or cause to be done, by virtue hereof.

In witness whereof, I have hereunto set my hand and seal the 11th day of March, A. D. 1890.

R. L. BENNETT. [L. S.]

Signed and sealed in presence of—

F. P. DAMON.

Assignment of Contract to Dawson Water Works Co.

For valuable consideration to it paid, the American Pipe Manufacturing Company, a corporation organized under the laws of the State of New Jersey, hereby assigns, transfers and sets over unto the Dawson Waterworks Company, a corporation of the State of Georgia, its successors and assigns, all the right, title and interest, property, claim and demand of the American Pipe Manufacturing Company in and to the rights, liberties and privileges conferred upon it by a certain ordinance of the city council of the city of Dawson, in the State of Georgia, adopted February 21st, 1890, and hereunto annexed.

In witness whereof the said The American Pipe Manufacturing Company has caused its corporate seal to be hereunto affixed, duly attested by its president and secretary, this 20th day of August, 1891.

THE AMERICAN PIPE MANUFACTURING CO.,
By EDWIN F. PARTRIDGE, *President.*

Attest:

H. BAYARD HODGE, *Secretary.*

[Seal A. P. Mfg. Co.]

STATE OF PENNSYLVANIA, } ss:
City and County of Philadelphia, }

Be it remembered that on the 20th day of August, 1891,
441 before me the subscriber, a notary public for the Commonwealth of Pennsylvania, residing in the city of Philadelphia, personally came H. Bayard Hodge, who, being duly affirmed according to law, deposed and said that he was personally present and saw the common or corporate seal of the American Pipe Manufacturing Company affixed to the foregoing assignment, that the seal so affixed is the common or corporate seal of the said company and was so affixed by the authority of the board of directors thereof, that E. F. Partridge is the president of the said company and did sign the said assignment as such in the presence of this deponent, that this deponent is the secretary of the said company and that the name of the said deponent subscribed to the foregoing assignment in attestation of the due executive thereof and the name of the said president are of their own proper and respective handwriting.

H. BAYARD HODGE.

Affirmed and subscribed to before me the day and year first above written.

THOMAS J. HODGE,
Notary Public, Philadelphia, Pa.

[SEAL.]

GEORGIA, }
Terrell County. }

Clerk's office, superior court.

Recorded in Book N., page- 655–659 25th day of August, 1891.
F. W. CLARK, *Clerk.*

Filed in office August 25th, 1891.
F. W. CLARK, *Clerk.*

Charter of American Pipe Manufacturing Company was next offered in evidence by the complainant, with certificates, etc., as follows:

442 *Charter of American Pipe Manufacturing Company.*

Certificate of the organization of the American Pipe Manufacturing Company.

This is to certify that we, Edwin F. Partridge, Nathan B. Cox, Joseph Hawley, William S. Perot Jr., William M. Paul, David J. Hoar, Joseph S. Keen Jr., Charles S. Farnum, and Clifford Stanley

Sims, do] hereby associate ourselves' into a company under and by virtue of the provisions of an act of the legislature of the State of New Jersey, entitled "An act concerning corporations," approved April 7th, 1875, and the supplements thereto and acts amendatory thereof, for the purposes hereinafter mentioned; and to that end we do by this, our certificate, set forth:

First. That the name we have assumed to designate such company and to be used in its business and -ealings, is the American Pipe Manufacturing Company.

Second. That the place in this State where the business of such company is to be conducted, is the city of Camden, in the county of Camden, and the place out of this State where the same is to be conducted in the city of Philadelphia, in the State of Pennsylvania; and that the objects for which the company is formed are as follows namely, for the purpose of carrying on within the State of New Jersey, and the adjoining State of Pennsylvania, and the other States and Territories of the United States of America and every portion thereof, the manufacture of Phipps patent hydraulic pipe and other pipe, for the use of water, gas, electric light and power, or natural gas companies, or for the use of sewers or drains, or any other purpose; and the business of selling and disposing of the same and also the business of contracting with any person or persons, or any corporations, municipal or otherwise, having the
443 right, power or franchise to build and construct water supply works, gas works, electric light and power plants or natural gas plants, or any other works of improvement within said States and Territories, or either of them, to build, construct, enlarge or complete such water supply works, gas works, electric light and power plants or natural gas plants or any other works or improvement, or any part or portion thereof, and to receive in payment in whole or in part, therefor shares of the capital stock or bonds, if any, of the above described corporations, or securities issued by any government, State, county, city or other corporations, municipal or otherwise, and to sell the same; and to lease, purchase, hold, assign, convey, mortgage and exchange real or personal property or contracts, and for the purposes of said business to issue bonds secured by a mortgage or mortgages upon the property and franchises of the said company; together with the right to purchase and hold any patents, or re-issues, renewals, improvements, modifications and extensions thereof, and the right of manufacture, use and sale of devices or appliances applicable to the business of the said company, and the right of sale or other disposition, whether territorial or otherwise, of the same, and together with all and everything incidental to the promotion of the objects and purposes aforesaid.

The principal office of the company will be located and maintained in the said city of Camden; and the portion of the business of the company which is to be carried on out of this State, in the said city of Philadelphia, is such portion thereof of any ordinarily administrative character, as can be conveniently and legally transacted there.

Third. That the total amount of the capital stock of said
444 company is one million dollars; the number of shares into which the same is divided is ten thousand and the par value of each share is one hundred dollars; the amount with which the said company will commence business is two thousand dollars, which is divided into twenty shares, of a par value of one hundred dollars each.

Fourth. The names and residences of the stockholders and the number of shares held by each, are as follows, towit: Edwin F. Partridge, Philadelphia, Pennsylvania, three shares, Nathan B. Cox, Philadelphia, Pennsylvania, two shares. Joseph W. Hawley, Media, Pennsylvania, two shares. William S. Perot Jr. Philadelphia, Pennsylvania, three shares. William M. Paul, Moorestown, New Jersey, two shares. David J. Hoar, Philadelphia, Pennsylvania, two shares. Joseph S. Keen Jr., Philadelphia, Pennsylvania, two shares. Charles S. Farnum, Philadelphia, Pennsylvania, two shares. Clifford Stanley Sims, Mount Holly, New Jersey two shares.

Fifth. The period at which said company shall commence is the first day of February, A. D. eighteen hundred and eighty nine, and the period at which — shall terminate is the 31st day of January, A. D. nineteen hundred and thirty nine.

In witness whereof, we have hereunto set our hands and seals this 26th day of January A. D. 1889.

EDWIN F. PARTRIDGE. [L. S.]
N. B. COX. [L. S.]
J. W. HAWLEY. [L. S.]
WILLIAM S. PEROT, JR. [L. S.]
W. M. PAUL. [L. S.]
DAVID J. HOAR. [L. S.]
JOS. S. KEEN, JR. [L. S.]
CHAS. S. FARNUM. [L. S.]
CLIFFORD STANLEY SIMS. [L. S.]

445 STATE OF NEW JERSEY, } ss:
County of Camden, }

Be it remembered, that on this 26th day of January, A. D. 1889 before me a master in chancery of New Jersey, personally appeared Edwin F. Partridge, Nathan B. Cox, Joseph W. Hawley, William S. Perot Jr., William M. Paul, David J. Hoar, Joseph S. Keen Jr., Charles S. Farnum and Clifford Stanley Sims, who, I am satisfied, are the persons named in and who executed the foregoing certificate, and I having first made known to them the contents thereof, they did each acknowledge that they signed, sealed and delivered the same as their voluntary act and deed, all of which is hereby certified.

B. F. H. SHREVE, *M. C. C.*

STATE OF NEW JERSEY, }
Department of State. }

I, Henry C. Kelsey, secretary of state of the State of New Jersey, do hereby certify, that the foregoing is a true copy of the certificate of organization of the American Pipe Manufacturing Company, and of the endorsement of the county clerk thereon, as the same is taken from and compared with the original file in my office on the 31st day of January, A. D. 1899, and now remaining on file therein.

In testimony whereof I have hereunto set my hand and affixed my official seal at Trenton, this 31st day of January, A. D. 1889.

HENRY S. KELSEY,
Secretary of State.

[SEAL.]

Received Jan. 28th, 1889, and recorded in the clerk's office of the county of Camden in Book Four of Corporation-, page 190, etc.

E. C. BURROUGH, *Clerk.*

446 Mr. WIMBERLY: We next offer the charter of the Dawson Waterworks Company, found on pages 88 and 89 of the printed record, application for charter, the order of the court allowing it, and the certificate of transcript: The whole thing as set out on those two pages, the charter being granted on July 10, 1891. I suppose there is no necessity for my specifying this more particularly, the record shows what it is and everything?

The MASTER: No, sir.

Mr. WIMBERLY: The record shows that the charter was granted July 10, 1897. That is an error. It should be July 10, 1891.

Charter of the Dawson Waterworks Company.

GEORGIA, }
Terrell County. }

To the superior court of said county:

The petition of Joseph W. Hawley, William S. Perot, Jr., F. M. Brooks, Joseph S. Keen and H. Bayard Hodge respectfully shows that they desire for themselves, their associates and successors, to be incorporated under the corporate name of the Dawson Water Works Company.

The objects of their said incorporation are pecuniary gain and profit for their stockholders in said company; and the particular business to be carried on by said corporation is to construct, extend and maintain and operate a system of waterworks in the city of Dawson, Georgia, and its vicinity.

The capital stock of said company shall be ten thousand dollars

divided into shares of one hundred dollars each, with the privilege of increasing said capital stock to an amount not exceeding one hundred thousand dollars.

Their place of doing business will be in said city of Dawson, but your petitioners desire to hold meetings of the stockholders
447 of said company in the city of Philadelphia, Pennsylvania, and to have an office there.

Your petitioners desire to be incorporated as aforesaid for the term of twenty years, with the privilege of renewal according to law.

Wherefore your petitioners pray that they, their associates and successors may be made a body corporate and politic under the name of the Dawson Water Works Company with the privilege and the power to carry on the business hereinbefore named; to contract and be contracted with, to sue and be sued; plead and be impleaded, to have and use a common seal; to make by-laws (not inconsistent with the laws of Georgia and of the United States), for the government of its members, officers, agents or employés, and to alter or amend the same at pleasure; to borrow money for corporate purposes, and to secure the same by mortgage deed, or otherwise as may be deemed advisable; to make notes and accounts; to appoint all officers and agents for the management of its business; to employ all servants, workmen or others useful or needful to properly conduct the business of said corporation; to acquire, hold and dispose of any and all property real and personal and choses in action, as may be necessary or convenient for the transactien of the business aforesaid, and to have and enjoy all other rights and privileges conferred by law upon corporations of like character created by the statutes of Georgia.

HOYL & PARKS,
Petitioners' Attorneys.

Filed in office June 9, 1891,

F. W. CLARK,
Deputy Clerk.

Application for Charter in Terrell Superior Court.

May Adjourned Term, 1891.

448 *In re* JOSEPH W. HAWLEY, WILLIAM S. PEROT, JR., ET AL.

It appearing to the court that Joseph W. Hawley, William S. Perot Jr., F. M. Brooks, Joseph S. Keen, and H. Bayard Hodge, have filed their petition in this court praying to be incorporated under the name of the Dawson Waterworks Company; that said petition has been duly recorded and published as required by law; and the court being satisfied that the said application is legitimately within the purview and intention of the law:

It is therefore ordered and adjudged by the court that the said application be and it is hereby granted; and that the said petitioners, their associates and successors be and they are hereby incorporated under said name the Dawson Waterworks Company, for and during the term of twenty years from this date, with the privilege of renewal according to law; and under said name they shall have all the rights, powers and privileges set forth and prayed for in the said petition, and such other rights and powers as are granted by law to corporations of like character.

This July 10, 1891.

J. H. GUERRY,
J. S. C., P. C.

STATE OF GEORGIA, }
Terrell County. }

I certify that the foregoing is a correct transcript from the records of Terrell superior court.

Given under my hand and seal of office this 25th day of July, 1891.

[SEAL.] F. W. CLARK,
Deputy Clerk.

449 Mr. WIMBERLY: I next offer the mortgage given, or trust deed—the instrument shows as to what is the proper name to give to it, made by the Dawson Water Works Company to the Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Company, as trustee for the bondholders, found in the printed record on pages 89 to 94 inclusive: including the acknowledgment and certificate of record, which appears on the original mortgage. That is recorded in the clerk's office, Terrell superior court, Book S, page 460 to 465, 26th day of September, 1891.

Mortgage of Dawson Waterworks.

450 Mortgage of Dawson waterworks.

This indenture made the 1st day of September, anno Domini one thousand eight hundred and ninety-one, between the Dawson Waterworks Company, a corporation of the State of Georgia, party of the first part, and the Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Company, a corporation of the State of
451 Penna., party of the second part: witnesseth that,

Whereas, on the 17th day of August, anno Domini, one thousand eight hundred and ninety-one, the following resolution was adopted at a meeting of the stockholders of the Dawson Waterworks Company, aforesaid, and all of the stockholders of said company consenting thereto:

"Resolved, That the board of directors be and are hereby author-
"ized to prepare and execute and to issue and sell for the purpose of
"this company eighty (80) first mortgage bonds of five hundred
"($500) dollars each, numbered from one to eighty inclusive. Said
"bonds to be dated September 1st, 1891, and payable in lawful
"money of the United States on the first day of September, 1916,
"bearing interest at the rate of 6 per cent. per annum payable on
"the first day of March and September in each year, said bonds
"amounting in the aggregate to forty thousand ($40,000) dollars, to
"be secured by a deed of trust by way of a mortgage of all the prop-
"erty, real and personal, franchises, privileges, rights and liberties
"now owned or hereafter to be acquired by the Dawson Water-
"works Company. The yearly rental which the city of Dawson,
"Georgia, binds itself to pay in accordance with the terms of the
"franchise granted by the said city February 21st, 1890, amounting
"in the aggregate to $2,000 per annum, payable semi-annually and
"paid into the hands of the trustee of the mortgage bonds for inter-
"est purposes on said bonds, and in case the city of Dawson con-
"tracts to increase the number of five hydrants." "The income or
"yearly rental shall also be paid into the trustee's hands for said
"purpose of paying interest upon the first mortgage bonds, and
"should there be any money received by the trustee from said
"sources in excess of the amount required to meet interest on the
"bonds, such excess shall be returned to the treasurer of the Daw-
"son Waterworks Company."

Now this indenture witnesseth, that the Dawson Waterworks Company, aforesaid, as well in consideration of the premises and the better securing the payment of the above described bonds, and the interest which will accrue thereon as of the sum of one dollar unto them well and truly paid by the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, aforesaid, at the time of the execution hereof, the receipt whereof is hereby acknowledged, have granted, bargained, sold, ali-ned, released and confirmed, and by these presents do grant, bargain, sell, alien, release and confirm unto the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, aforesaid, and their successors, all the real estate and personal property, corporate rights and franchises, privileges and appurtenances of the Dawson Waterworks Company aforesaid.

452 Together with all and singular the improvements and structures, machinery, dams, reservoirs, pipes, water courses, rights, easements, liberties, privileges, hereditaments and appurtenances whatsoever unto the hereby granted premises belonging *to* or in anywise appertaining, and the reversions, remainders, rents, income, earnings, issues and profits thereof; and together with all other property and franchises of every kind and description of the Dawson Waterworks Company, aforesaid, that may be hereafter owned and acquired by them; and together with any and all income now or hereafter payable to the said The Dawson Waterworks Company under any agreements made between the said company and

the city of Dawson, Georgia, aforesaid, or payable under any ordinance of the said city; and also any and all income now or hereafter payable to the said company under any agreements that may be made between it and any other corporation, individuals, or partnerships:

To have and to hold, receive and take, all and singular the real and personal estate, premises, hereditaments, corporate rights, franchises, privileges and appurtenances hereby granted unto the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Co., aforesaid, and their successors to and for their only proper use and behoof:

But in trust nevertheless, for the use, benefit and security of the person or persons, body or bodies politic or corporate, who shall become holders of the said bonds, or any of them, issued as aforesaid by the said The Dawson Waterworks Company.

And it is expressly understood and agreed that if default be made in the payment of the interest on the bonds herein referred to and secured by this mortgage, for six months after the time appointed for the payment of said interest, or if the Dawson Waterworks Company shall fail at any time to pay taxes that shall be assessed upon the property hereby mortgaged for a period of six months after the same shall have been assessed, in either event the principal sum of said bonds shall at the option of the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, aforesaid, become due and payable, as if the time appointed for the payment thereof had actually arrived, and in either such event, or in the event of the said bonds not being paid at maturity, the Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Company aforesaid trustees, or their successors in the trust, shall forthwith commence proceedings at law or in equity for the recovery of the principal sum due with interest, and together with an additional sum not to exceed five per centum upon the principal sum hereby secured, which shall be recoverable by way of a reasonable compensation to the said
453 trustee and for expenses of counsel and otherwise in this trust, or may with or without entry, and shall upon the written request of the holders of one-half in value of the bonds hereby secured, cause all and singular the premises, appurtenances, property and franchises of every description hereby conveyed to be sold as an entirety at public sale, to the highest and best bidder in the city of Dawson, Georgia, aforesaid, after giving at least sixty days' notice of the time, place and terms of such sale by advertisement once a week in newspapers of general circulation in the city of Dawson, Georgia, aforesaid, and in the city of Philadelphia, in the State of Pennsylvania, and upon such sale being made, the trustee for the time being shall make, execute and deliver unto the purchaser thereof a good and sufficient deed in fee simple, conveying and assigning the property so sold, and such conveyance shall be a perpetual bar in law and equity against the Dawson Waterworks Company aforesaid, its successors and assigns and against all persons

claiming or to claim under it or them of all right, title, interest or claim of, in and to the said property and franchises or any part thereof, and in the event of such legal proceedings or sale, the trustee for the time being after deducting from the proceeds the costs and expenses thereof, and such reasonable compensation to the trustee and its attorneys and agents for services in connection therewith, not exceeding the amount above specified, shall apply so much of the proceeds thereof as may be necessary to the ratable payment of the said principal sum and the interest then due thereon, and if any proceeds shall remain in its hands after the full payment of the said principal sum and the accrued interest, then it shall pay over the same to the party of the first part thereto, its successors and assigns; and in the event of said trust becoming vacant from any cause whatsoever, the Dawson Waterworks Company aforesaid shall have full power and authority to nominate and appoint a new trustee for the purpose of filling the vacancy; and in the event of the failure of the Dawson Waterworks Company, aforesaid, for thirty days after such trust shall have become vacant to appoint a new trustee as aforesaid, such appointment may be made by the proper judicial authority of the said State of Georgia, upon application of holders of the bonds hereby secured to the value of not less than five thousand dollars, and upon such appointment being made and accepted, the substituted trustee shall, without further act or deed become vested with all and singular the estate, rights, powers, and perform all the duties of trustee in like manner and with the same effect as if a party *of* these presents.

And the said The Dawson Waterworks Company hereby
454 covenants and agrees that it will on the first day of September, 1901, and annually thereafter, whenever any of said bonds can be purchased at not exceeding their par value, apply and appropriate out of the net earnings of the year previous and annually thereafter on the last day of the month of August when sufficient therefor, a sum equal to one and one-quarter per cent. upon all of the bonds that may have been issued under this mortgage to the purchase of such bonds as aforesaid, and when so purchased cancel the same; but, if the said bonds cannot be purchased at or under the price aforesaid, then the said trustee for the time being shall invest the moneys composing said sinking fund in such lawful securities as may be deemed advisable, the proceeds whereof, together with the accumulations of interest thereon shall belong to the said sinking fund, and be applied to the purchase of the said bonds as aforesaid whenever the same can be purchased at or under the price hereinbefore named.

And the said The Dawson Waterworks Company hereby covenants and agrees it will on demand from time to time hereafter execute, acknowledge and deliver to the said The Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Co., trustees, as aforesaid, and its successors or to the trustee for the time being, any and all such further conveyances and assurances as may be necessary and proper

fully to convey to and vest in the Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Co., trustee as aforesaid, and its successors, or the trustees for the time being, all future acquired real and personal estate, equipment and property, *rights and franchises* it may hereafter purchase and take for the purpose of carrying on its business.

Provided always nevertheless, that if the Dawson Waterworks Company, aforesaid, shall well and truly pay or cause to be paid unto the person or persons, body or bodies politic or corporate, who shall become holders of the bonds issued as aforesaid, the principal of said bonds with the interest as therein stipulated, without fraud or further delay, and without any deduction, defalcation or abatement for taxes or otherwise, then and from thenceforth as well this present indenture and estate hereby granted as the said bonds shall cease, determine and become void, anything herein contained to the contrary notwithstanding, and the said trustee or its successors shall forthwith cause satisfaction to be entered upon the record hereof.

In testimony whereof, the said The Dawson Waterworks Company has caused its corporate seal to be hereto affixed, and
455 these presents to be subscribed by its president and secretary the day and year first above written.

THE DAWSON WATERWORKS COMPANY,
By J. W. HAWLEY, *President.*
Attest: H. BAYARD HODGE, *Secretary.* [SEAL.]

Sealed and delivered in the presence of:
WILLIAM S. PEROT, JR.
JOS. S. KEEN, JR.

The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, the trustee named in the foregoing indenture, doth hereby accept the trust thereby created, upon the terms and conditions therein set forth.

Witness the corporate seal of the said company, duly attested this nineteenth day of September, A. D. 1891.

By JNO. K. CUMING, *President.*
Attest: WALTER SCOTT, *Secretary.* [SEAL.]

STATE OF PENNSYLVANIA, } ss:
County of Philadelphia, }

Be it remembered, that on the 1st day of September, A. D. 1891, before me a commissioner for the State of Georgia within and for the county and State aforesaid, personally came H. Bayard Hodge, who being duly affirmed, according to law, deposed and said that he was personally present and saw the common corporate seal of

the Dawson Waterworks Company affixed to the foregoing indenture; that the seal so affixed is the common or corporate seal of the said company, and was so affixed by the authority thereof; that J. W. Hawley is the president of the said company, and did sign the said indenture as such in the presence of the said deponent; that said deponent is the secretary of the said company, and that the name of said deponent subscribed to the foregoing indenture in attestation of the due execution thereof, and the name of the said president, are of their own proper and respective handwriting.

H. BAYARD HODGE.

Sworn and subscribed to before me, the day and year first above written.

SAMUEL L. TAYLOR,
[SEAL.] *Commissioner of Deeds for the State of Ga.*

Philadelphia, Pa.

GEORGIA, }
Terrell County. }

Clerk's office, superior court.

Recorded in Book S, page 460 to 465, 26th day of September, 1891.

Filed in office Sept. 26th *Sept.*, 1891, 10 a. m.

H. W. CLARK, *Clerk.*

456 *Minutes City Council, May* 10, 1886, *Offered by the Complainant.*

Minutes city council, May 10, 1886.

Vol. 1, page 75, regular call meeting, city council of Dawson, May 10, 1886.

Present: Wm. R. Baldwin, mayor; Kendrick, Hood, Kaigler and Melton, aldermen.

The meeting of the city council was called to take action in regard to the city council paying notes due for fire engine and in reference to supplying the city with water works. A motion was made and carried that the finance committee go forward and pay note for $162.00 due on fire engine.

A motion was made and carried that the question of incurring expense of waterworks be submitted to the citizens of the city, and that notice of an election to be run in the Dawson Journal for the time prescribed by law, and that an election be held on said question on the 11th day of June next, 1886.

There being no further business the council adjourned. Confirmed June 10th, 1886.

WM. R. BALDWIN, *Mayor.*

Page 78, call meeting, city council of Dawson, July 18th, 1886.

Present: Mayor Wm. R. Baldwin. Aldermen Kendrick, Kaigler, Lowrey and Hood.

The certificate of an election held in the city of Dawson on June 11th, 1886, on "waterworks" or "no waterworks" for said city, the result being in favor of waterworks, was presented and the same was received, and ordered to be made a matter of record.

WM. R. BALDWIN, *Mayor.*

STATE OF GEORGIA, }
Terrell County. }

Clerk's office, city council of Dawson, Ga.

I hereby certify that the foregoing contains a true and complete transcript of such parts of the records of said city as are therein set forth.

I further certify that I was regularly elected and sworn in as clerk of the city council of Dawson, Georgia, and am now clerk of said council and as such have the care, custody and control of its records.

In testimony whereof, I have hereunto set my hand and affixed my seal of office, at Dawson, Georgia, this the 25th day of May, 1899.

L. C. HOYL,
Clerk City Council.

[SEAL.]

457 Mr. WIMBERLY: I offer next the election notice in the Dawson Journal: with certificate of ordinary, page 96 of printed record.

Election Notice, Dawson Journal.

Issues of May 13, 20, 27, and June 3, 1886.

Election notice published in the Dawson Journal once a week for four weeks, to-wit: in the issues of May 13th, 1886, May 20th, 1886, May 27th, 1886 and June 3rd, 1886, being part of the permanent files of said Dawson Journal kept as required by law in the office of the ordinary of Terrell county, Georgia, said newspapers not being otherwise obtainable.

Dawson Journal of May 13th, 1886, 2nd page, 5 column.

Election Notice.

Notice is hereby given that there will be an election held in the city of Dawson on the 11th day of June, 1886, to determine whether the city of Dawson shall incur expenses for waterworks.

Done by order of council.

W. R. BALDWIN, *Mayor.*

May 10th, 1886.

Mr. WIMBERLY: In connection therewith, I offer the transcript certified by the ordinary of Terrell county, same page:

GEORGIA, }
Terrell County. }

I, J. W. Roberts, ordinary of said county, do hereby certify that the within and foregoing two pages of typewritten matter are a true and correct transcript from the Dawson Journal of dates May 13th, 1886, May 20th, 1886, May 27th, 1886, and June 3rd, 1886; and that said newspapers constitute a part of the file kept as required by law in the office of the ordinary of said county, said Dawson Journal being the newspaper in which legal advertisements are published in and for said county.

I do further certify that I am the legal custodian of said file of newspapers.

458 Witness my hand and official signature and seal of office this 24th day of May, 1899.

J. W. ROBERTS,
[SEAL.] *Ordinary, Terrell County, Georgia.*

Mr. WIMBERLY: I offer next the minutes of the city council of Dawson of February 21st, 1890, on page 96 of the printed record.

Minutes City Council.

Page 25, Minutes, Book 2, city council of Dawson.

Call meeting, city council of Dawson, Feb. 21, 1890.

Present: Mayor W. B. Cheatham. Aldermen Kaigler, Deubler, Turner and Rainey.

The object of the meeting was to take into consideration the matter of waterworks for the city of Dawson. After hearing Mr. R. L. Bennett, representing waterworks company, the council unanimously agreed to institute a system of waterworks for the city and entered into an agreement with R. L. Bennett and associates to establish the same, which agreement was signed by the contracting party.

W. B. CHEATHAM, *Mayor.*

J. L. JANES, *Cl'k.*

Confirmed.

Mr. WIMBERLY: We next offer the minutes of the city council of Dawson of March 14th, 1891, found on page 97 of the printed record:

Page 67, regular adjourned meeting, city council of Dawson, March 14th, 1891.

Present: Mayor Cheatham; Aldermen Deubler, Kaigler, Hannah, Turner and Rainey.

Mayor Cheatham submitted report on analysis of water
459 by Prof. White of Athens, Ga. Upon which the following resolution was passed on and unanimously adopted:

Resolved, That the water supply from either or all the places where samples of water *was* taken, for analysis made by Prof. H. C. White, namely: No. 1, spring at Dunn spring; No. 2, creek above bridge; spring No. 3, at Jas. T. Lee's and spring No. 4, on Dr. Farrar's farm, is accepted as supply for water to fill contract and franchise granted R. L. Bennett and associates.

A motion was made and carried that the city pass an order for $50.00 in favor of Dr. H. C. White, for analyzing water.

W. B. CHEATHAM, *Mayor.*

J. L. JANES, *Cl'k.*

Confirmed.

Mr. WIMBERLY: We next offer the minutes of the city council of Dawson, of March 14th, 1891, found on page 97 of the printed record:

Page 69, regular adjourned meeting, city council of Dawson, March 23, 1891.

Present: Mayor Cheatham; Aldermen Deubler, Turner, Kaigler and Rainey.

The meeting was called for the purpose of receiving communication from the American Pipe Company, Pa., stating that they had purchased franchise of R. L. Bennett to build waterworks in city of Dawson, asking for an extension of sixty days to begin work in order to get time to market bonds.

Upon which the following resolution was passed and adopted, viz:

It appearing to city council of Dawson, Ga., that the American Pipe Mfg. Co., of Phila. Penn., having bought franchise granted R. L. Bennett and associates, Feb'y 21, 1890, to build a system of waterworks, and that said American Pipe Mfg. Co. in-
460 tended building the system of waterworks under said franchise, an extension of sixty days from date of expiration of said franchise is hereby granted said American Pipe Co. in which to complete said system of waterworks (page 70), provided they shall commence said work before the expiration of franchise as granted R. L. Bennett and associates or Aug. 21, 1891.

W. B. CHEATHAM, *Mayor.*

J. L. JANES, *Cl'k.*

Confirmed.

Mr. WIMBERLY: We next offer the minutes of the city council of Dawson of August 12, 1891, beginning at the foot of page 97 and extending through nearly the whole of page 98—pages 97 and 98 of the printed record:

Page 81, call meeting of the city council of Dawson, Aug. 12, 1891.

Present: Mayor Cheatham; Aldermen Hannah, Turner, Rainey, Kaigler and Deubler.

The purpose of the meeting was to take into consideration the question of accepting waterworks.

Mr. Daws, representing American Pipe Co., appeared before the council and stated that the work on waterworks for the city had been completed and tendered the same to the city according to the terms of contract, and that the company would not expect any pay only from the time they begin to furnish water to the city. After testing the waterworks a formal acceptance in writing was made to the American Pipe Company; and the following was ordered to be entered upon the minutes, viz:

"The city council of Dawson, Ga., hereby accept from American Pipe Mfg. Co., successors to R. L. Bennett & Co., the system
461 of waterworks as fully complying with contract of R. L. Bennett & Co., and afterwards transferred to American Pipe Mnfg. Company, after fully testing the system the same is hereby accepted from this date, in full compliance of said contract and in many particulars exceeding contract and none being less than called for in contract."

There being no further business council adjourned.

W. B. CHEATHAM, *Mayor.*

J. L. JANES, *Cl'k.*

(Endorsed on margin:) Confirmed.

STATE OF GEORGIA, }
Terrell County. }

Clerk's office, city council of Dawson, Ga.

I hereby certify that the foregoing pages hereto attached contain a true and complete transcript of such parts of the records of said city as are therein set forth.

I further certify that I was regularly elected and sworn in as clerk of the city council of Dawson, Georgia, and am now clerk of said council and as such have the care, custody and control of its records.

In testimony whereof I have hereunto set my hand and affixed my seal of office, at Dawson, Georgia, this the 25th day of May, 1899.

[SEAL.] L. C. HOYL,
Clerk City Council.

462 Mr. WIMBERLY: I next offer the batch of letters pinned together, extending from page 98, near the bottom of page 98, on through to near the bottom of page 102, of the printed record:

Letter M'ch 4, 1891, Cheatham, Mayor, to Perot, Treasurer, Enclosing Letter from H. C. White.

DAWSON, GA., *M'ch* 4, 1891.

American Pipe Co., Phila., Penn., Wm. S. Perot, treas.

DEAR SIR: From enclosed you will see that we have not been at fault in not having analysis of water before now, and that it will be forthcoming at once or in a very few days. I will say that
463 Prof. White's analysis will satisfy all concerned. He is the peer of any man in his profession. Mr. Keen will, I think, endorse me in this statement. I don't expect anything but a pure water in any of the samples. Am sure there will be but little difference. Sample No. 1 may show up some little mineral or gaseous combination. Remember No. 4 is our most available supply, tho' any are easy of access and obtainable.

Yours very respty.,

W. B. CHEATHAM, M. D., *Mayor.*

P. S.—Will write again and forward analysis on its reception.

Yours, &c., CHEATHAM, *Mayor.*

Letter, March 2, 1891.

ATHENS, GA., *March* 2, 1891.

Prof. White to Cheatham.

Dr. W. B. Cheatham, Dawson, Ga.

DEAR SIR: Absence from home has delayed reply to your valued favor of 25th inst. The four samples of water are safely to hand and have immediate attention. The usual charge for water analysis where complete analysis *are* desired is from $20 to $35 for each sample. As the four samples are sent together the charge for all will be fifty dollars ($50) including complete analysis of each. The analysis will require five or six days to make, but I hope to be able to report to you by the end of the week.

Very truly yours, H. C. WHITE.

Letter of March 14, 1891.

From Cheatham, mayor, to A. P. Co., inclosing analysis of Prof. White.

DAWSON, GA., *M'ch* 14, 1891.

American Pipe Mnfg. Co., Philadelphia, Penn.

GENTLEMEN: Enclosed I have the pleasure of handing you Prof. H. C. White's analysis of the waters; also resolution of the city council which was adopted unanimously. # 1 spring is about 14 or 15 hundred feet above bridge; Dunn's spring, spring # 2, is from the creek just few feet above the bridge; spring # 3 is Lee's spring, east side of creek, about three hundred feet this, or town, side of bridge; spring # 4 is Farrar's spring in farm about 1200 ft. west of bridge.

You will see that all these waters are good, pure water and
464 no one can object to them. I wrote Prof. White as a private citizen and gave him no idea of why or for what I wanted water analyzed. So he made analysis uninfluenced by anything, didn't know that we wanted it for drinking purposes or that I was mayor of our town.

Our city council will readily grant extension as asked. They are a unit as friends of the project and are thoroughly in sympathy with your company. Trusting this is entirely satisfactory, I am,

Yours very truly, W. B. CHEATHAM, *Mayor.*

P. S.—We file original analysis and send you exact copies.

Yours, &c., W. B. CHEATHAM.

Resolved that the water supply from either or all the places where sample of water was taken for analysis made by Prof. H. C. White, namely: # 1 spring at Dunn's; spring # 2, creek above bridge; spring # 3 at Jas. T. Lee's, and spring # 4 on Dr. Farrar's farm is accepted as supply for water to fill contract and franchise granted R. L. Bennett and associates.

Adopted unanimously at regular meeting of city council, March 14, 1891.

W. B. CHEATHAM, *Mayor.*
J. L. JANES, *Clerk.*

This is to certify that the foregoing is a true copy from original minutes of city council passed at regular meeting.

March 14, 1891.

[SEAL.]

J. L. JANES,
Clerk City of Dawson.

Analysis of Spring Waters for Dr. W. B. Cheatham, Dawson, Ga.

Spring No. 1.

A clear, transparent, colorless and odorless water. Contains an appreciable quantity of carbonic acid gas in solution and is slightly sparkling. Its chief mineral ingredient is carbonate of lime. Absolutely free from organic impurity. No sediment deposits on standing.

Solid matters dissolved.	Grains per U. S. gal.
Carbonite of lime	1.862
Carbonate of soda	0.102
Carbonate of magnesia	0.604
Carbonate of iron	0.028
465 Sulphate of lime	0.653
Sulphate of soda	0.031
Sodium chloride	0.213
Silica	0.664
Organic matter	0.017
	4.174
Nitrates	none.
Parts in 1000.000.	
Free ammonia	none.
Albumenoid ammonia	none.

Spring No. 2.

Clear and odorless with a faint yellowish brown color due to vegetable matter in solution. On standing, traces of organic sediment are deposited. Organic impurity very slight and mainly vegetable. A perfectly pure and safe water.

Solid matters dissolved.	Grains per U. S. gal.
Carbonate of lime	0.788
Carbonate of soda	0.214
Carbonate of magnesia	0.538
Carbonate of iron	0.104
Sulphate of lime	0.762
Sulphate of soda	0.028
Sodium chloride	0.120
Silica	0.543
Organic matter	0.562
	3.659
Nitrates	none.
Parts in 1000.000.	
Free ammonia	0.002
Albumenoid ammonia	0.001

Spring No. 3.

Clear, transparent, colorless and odorless. Quantity of mineral matter in solution remarkably small. Absolutely pure.

Solid matters dissolved.	Grains per U. S. gal.
Carbonate of lime	0.471
Carbonate of soda	0.069
Carbonate of magnesia	0.072
Carbonate of iron	0.024
Sulphate of lime	0.315
466 Sulphate of soda	0.010
Sodium chloride	0.098
Silica	0.132
Organic matter	0.011
	1.202
Nitrates	none.
Parts in 1000.000.	
Free ammonia	none.
Albumenoid ammonia	trace

Spring No. 4.

Faintly turbid; slightly colored by vegetable matter in solution. Slightly organic sediment on standing. Organic impurity slight and entirely unobjectionable. A pure, safe water.

Solid matters disolved.	Grains per U. S. gallon.
Carbonate of lime	0.685
Carbonate of soda	0.131
Carbonate of magnesia	0.152
Carbonate of iron	0.102
Sulphate of lime	0.540
Sulphate of soda	0.008
Sodium chloride	0.131
Silica	0.341
Organic matter	0.673
	2.763
Nitrates	none.
Parts in 1000.000.	
Free ammonia	0.003
Albumenoid ammonia	0.003

467 Mr. WIMBERLY: We next offer the publication of the water-works contract, being a transcript from the Dawson News of February 26, 1890, on pages 102, 103 and 104 of the printed record.

Mr. GUERRY: All of which we object to. It is a clipping from a newspaper, it is irrelevant, incompetent and because it is hearsay.

Mr. WIMBERLY: Your honor is familiar enough with the pleadings for us not to stop to argue these different objections; or do you prefer that we state each time our reason——

The MASTER: I prefer that you state your objection and the ground upon which you think it admissible.

Mr. WIMBERLY: Your honor will see the ground upon which it is offered set out in the bill. This publication of the contract is mentioned in the bill, alleging in brief on that point, that this contract, before it was acted on and large sums of money expended under it, it was duly published in the newspapers and publicity given to it in this town; all its citizens knew that the contract was made; and they permitted these large expenditures to be made and waterworks erected under the contract and they acquiesced in it without objection, this advertisement being one of the things showing publicity of it. I don't suppose your honor desires to make a final ruling on these matters?

Mr. GUERRY: My objection is that it is totally irrelevant. If the city authorities themselves did not have the right to make the contract, no mere acquiescence on the part of the people could ratify the contract. Your honor remembers that one of the issues in this case is the power of the city to make the contract that was made.

The MASTER: I think your objection goes to the weight of the testimony rather than to its admissibility.

468 Mr. GUERRY: No, sir; it goes directly to the admissibility.

The MASTER: There being an allegation in the bill to the effect that they had notice and that allegation remaining in the bill, at this stage of the case I will admit the testimony. I may subsequently rule it out.

Mr. GUERRY: If the evidence is not admissible, no allegation in the bill would make it admissible.

Mr. WIMBERLY: The pages are 102, 103 and 104.

Mr. GUERRY: This publication does not describe the contract made.

The MASTER: At this stage of the case I will admit it.

Mr. WIMBERLY: I don't suppose your honor would rule out anything?

Mr. WIMBISH: Unless it is clearly inadmissible.

(The complainant then introduced the following, as above) "Dawson News, Feb. 26, 1890.

The following is a transcript from the Dawson News, of Wednesday, Feb. 26, 1890, and being the whole of the second column and part of the third column on the third page of said paper; said paper being of file in the office of the ordinary of Terrell county, Georgia, and being a part of the permanent file required by law to be kept in said office, and not being elsewhere obtainable:

We'll have them!

A progressive step by the city council.

A first class system of waterworks to be constructed at once.

A grand step forward!

469 In writing these words, a page in Dawson's history is recorded—a page in future years will glow with the brilliance that always marks the step of progress and stamps a city with the public spirit that denotes its advancement from the ruts in which it ran for years and places it in the groove that will carry it to grand and lofty attainments.

On last Friday afternoon the city council unanimously entered into an agreement with Mr. R. L. Bennett, representing a Philadelphia company, which assures Dawson a first-class system of waterworks, costing in the neighborhood of $50,000, within the next few months.

The city grants the company the exclusive privilege of operating a system of waterworks here for 99 years, and the city will pay them $2,000 annually for water for fire purposes for twenty years, the city then to be furnished water without further charge.

The company will lay four and one-tenth miles of pipe, and furnish fifty fire plugs when the system is first constructed, these to be increased as the city grows.

Water will be used from a spring on Captain William Kagler's place, a mile and a half north of the city. The company has already bought the spring and will build there a reservoir that will hold 300,000 [gallons] of water.

The following is a synopsis of the contract entered into by the city and the company:

The city grants to R. L. Bennett and his associates the exclusive privilege of constructing and maintaining a system of waterworks for 99 years, the company to organize under the laws of Georgia and be styled the Dawson Waterworks Company. This company is to furnish the city and its inhabitants with water for protection against fire and for domestic, sanitary and other purposes.

The company shall have full power and authority to lay water pipes and mains along any and all the streets and avenues, and to that end shall have the right to dig ditches and trenches in the city to such depth and of such width as may be necessary. The city shall not be responsible for any damage occasioned thereby, and the streets shall not be unnecessarily obstructed thereby.

The system of waterworks shall be complete and in operation within eighteen months from date. They shall lay four and eight-tenths miles of pipe, 8, 6 and 4 inches in diameter, with a stand pipe of not less than 40,000 gallons capacity and of sufficient height to

produce a pressure on the mains such that from any hydrant will be projected fifty feet vertically in still air through 100 feet of fire hose with a one inch nozzle attached.

470 The company shall be required from the completion of their waterworks till their charter shall cease, to furnish a sufficient supply of water for all the purposes named unless prevented by unavoidable or providential cause. In such event they shall be allowed a reasonable time to make repairs, and if they still fail to furnish water their franchise shall be forfeited.

The company shall extend its pipes and mains and enlarge its system from time to time to meet the demands consequent upon the growth of the city.

The company shall establish at convenient places along its mains fire plugs of approved pattern, not to exceed fifty in all, until the corporate limits of the city are extended and the population of the city increased so that there are 500 people living in said extension, after which they shall be increased proportionately. As additional fire protection the company is to keep filled the present cisterns. In consideration of this the city obligates to pay the company $2,000 annually for twenty years, in semi-annual payments of $1,000 each on the first day of January and of July each year.

The company shall have the right to make reasonable rules and regulations for the government of private consumers of its water, but the rate charged per annum shall not exceed those named as follows: Dwelling, for domestic use, only $12, bath tub $8, water closet $8, wash basin $4, yard sprinklers $12, academies and schools double private rates, boarding house, double private rates, bar rooms $24, bakeries and barber shops $24, druggist with soda fountain $24, fountains $12 to $50, livery stables $25 to $50, single room offices $6, photograph galleries $24, stores same as dwellings per fixture, steam engines per horse power $5, hotels, mills, manufactories and other large consumers by the meter rate, meter rates per 100 cubic feet 25 cents.

In consideration of the company agreeing to furnish water for the public buildings and two public fountains, the city obligates to relieve them of all taxes."

GEORGIA, }
Terrell County. }

I, J. W. Roberts, ordinary of said county, do hereby certify that the within and foregoing four pages of typewritten matter are a true and correct transcript from the Dawson News, of date February 26th, 1890; and that said newspaper constitutes a part of the file kept as required by law in the office of the ordinary of said county, said Dawson News being the newspaper in which legal advertisements are published in and for said county. I do further certify that I am the legal custodian of said file of newspapers.

Witness my hand and official signature and seal of office this 24th day of May, 1899.

J. W. ROBERTS,
[SEAL.] *Ordinary, Terrell County, Georgia.*

471 Mr. WIMBERLY: We next offer in evidence correspondence beginning on page 105 and running to page 109 in the printed record. The last letter being dated June 15th, 1894, from William S. Perot, Jr., Tr., to Mr. A. J. Baldwin.

472 *Correspondence between City Council of Dawson and Dawson Waterworks Company, May 31 to July 9, 1894, inclusive.*

PHILADELPHIA, *May 31st*, 1894.

Mr. A. J. Baldwin, mayor, Dawson, Ga.

DEAR SIR: Upon our Mr. Daws return from his visit to Dawson, he informed us that you had intimated to him, that your city was contemplating the purchase of our waterworks if satisfactory terms and arrangements could be made. The contract does not provide for such purchase by arbitration or refer to it in any manner. I therefore think it would be proper to have you address a letter to the Dawson Water W. Co. embodying what you desire, so it can be laid before our board of directors, and we can then consider the question and answer you fully. I think it is the sentiment of our company that in all cases where a town prefers to own and operate its waterworks to endeavor to meet their views whenever possible.

Yours very truly, WM. S. PEROT, JR., *Tr.*

DAWSON, GA., *June* 5, 1894.

The Dawson Waterworks Co., Phila., Pa.

GENTLEMEN: In reply to letter 5/31 from Wm. S. Perot, Jr., Tr., will say it is the wish of our city to own and operate the waterworks of Dawson and with this end in view we will be pleased to know at your earliest convenience the best terms and price on which the works can be secured by our city. Awaiting your reply, I remain, yours very truly,

A. J. BALDWIN, *Mayor.*

PHILADELPHIA, *June 11th*, 1894.

Mr. A. J. Baldwin, mayor, Dawson, Ga.

DEAR SIR: Your esteemed favor of 5th requesting us to
473 name a price for the Dawson waterworks was received 2 days after our monthly meeting of our board. We will lay the communication before them on the next regular meeting of our board early in July.

The works can only be disposed of subject to the bonds issued on them, amounting to $40,000 at 6%. I do not see how it will be possible for your city to obtain what you now have, if you buy the works, for the same amount it now costs you per year, because we cannot get sufficient income to pay interest, fuel, wages and taxes.

Yours very truly, WM. C. PEROT, JR., *Tr.*

DAWSON, GA., *June 13th*, 1894.

Dawson Waterworks Co., Phila., Pa.

GENTLEMEN: On the 5th this month I wrote you saying that it is the wish of our city to own and operate the Dawson waterworks of Dawson, and with this end in view will be pleased to known at your very earliest convenience the best terms and price on which the works can be secured by our city. As I have had no reply as yet thought this letter might have miscarried. Will thank you for an early reply.

Respectfully, A. J. BALDWIN, *Mayor.*

PHILADELPHIA, *June* 28, 1894.

Mr. A. J. Baldwin, mayor, Dawson, Ga.

DEAR SIR: Our board of directors met yesterday. Your communication was laid before them, and passed a resolution authorizing me to offer you the Dawson waterworks, which is represented entirely by stock, it being a duly incorporated company, at the rate of 10% on its par. The company has outstanding $40,000 of bonds, bearing 6% interest and none held or owned by this company, its capital stock is $40,000 and this we offer to you and propose to deliver for 10% or $40,000, turning the company over to you free of all debts. The bonds of course remain outstanding and would have to be taken care of when interest is due by you. If you would prefer to retire the bonds you could possibly purchase a large number of them very close and possibly at par. If the proposition proves satisfactory, we can make the transfer at any time.

Yours very truly, WM. S. PEROT, JR., *Tr.*

474 PHILADELPHIA, *July* 3, 1894.

Mr. A. J. Baldwin, mayor, Dawson, Ga.

DEAR SIR: We are in receipt of a letter from W. H. Davis, chairman of com., saying, "the city will not be bound by any contract heretofore made with you for water." Also asking that friendly relations may be continued, this is refreshing indeed for such hot weather. The same day we received a copy of an injunction asking the court to set aside this contract, after you induced us to spend over $40,000 there. Owing to such unexpected news and complications as these being sprung upon us we feel at liberty to withdraw

the offer made you a few days ago putting a price on our property. Can you inform me *of* (if) the city intend to take the side of sustaining an honorable contract or do they propose to try to repudiate it.

Yours very truly, WM. S. PEROT, JR., *Tr.*

DAWSON, GA., *July 3d*, 1894.

Dawson Waterworks Co., Phila., Pa.

GENTLEMEN: In reply to yours of 28 will say at a meeting of our council held on Monday evening 2d, your proposition of $40,000 and 10% addition for your waterworks was considered and it being so far in excess of their expectations will say they cannot buy. Will state also that our council has been enjoined from the payment of or issuing order for July payment.

Respectfully, A. J. BALDWIN,
Mayor, for Com.

DAWSON, GA., *July 6th*, 1894.

Mr. Wm. S. Perot, Jr., Tr., Phila., Pa.

DEAR SIR: In reply to yours 3rd I note your remarks saying "after you induced us to spend over $40,000 there." If you mean by "you" that it was either myself or any of the present board that induced you in any manner to make the investment, you are mistaken in the matter, for as I understand it this board was elected by parties opposing the contract made by former council, not that they opposed waterworks, but the terms and price they think ex*h*orbitant. The contract you refer to is not a contract made by this council but by a former council, and this council does not feel
475 morally bound to carry it out, it is simply a legal question. If you are unfortunate in making an illegal contract you have only yourselves to blame. As to the am't due July 1st $1000.00 will say this council would have drawn warrant for same but for the injunction. As our committee wrote you this council would decline to carry out contract of former council further than July, '94. We hoped that we might get proposition from you to furnish us water at a price which we felt the city would be able to pay. I assure you that this council will not repudiate any legal contract.

Very truly yours, A. J. BALDWIN, *Mayor.*

PHILADELPHIA, *July 9th*, 1894.

Mr. A. J. Baldwin, mayor, Dawson, Ga.

DEAR SIR: Your letter of 6th received. When I wrote "you had induced us to spend over $40,000" I addressed you representing the city of Dawson, with whom we made the contract. It is a strange manner of reasoning you undertake to set forth and from our standpoint of view, should the water company or American Pipe Mfg.

Company change its officers and directors the contracts made would not be invalid, and under your argument a contract entered into with the present council, would in all likelihood be repudiated by the next one, we see no reason why our present contract is not legal and binding on both the city and the water company and if necessary shall ask the Supreme Court of the United States to pass up on it.

Very respectfully, WM. S. PEROT, JR., *Tr.*

DAWSON, GA., *June 27th*, 1894.

Dawson Waterworks Co., Philadelphia, Pa.

GENTLEMEN: The city council of Dawson at their meeting this day had determined not to continue the contract with your company, by which the city pays two thousand dollars per annum for water. Therefore we write to notify you that the city council will not be bound by any contract heretofore made with you for water. We would be glad for you to send a man here to confer with us and let us come to some agreement by which the friendly relations of the past can be continued.

Yours very truly, W. H. DAVIS,
Chairman Com.

PHILADELPHIA, *June 15th*, 1894.

Mr. A. J. Baldwin, Dawson, Ga.

DEAR SIR: Yours 13th received. I wrote you a few days ago in reply to yours of 5th and presume the letter crossed yours of
476 13th. I will write you at once as soon as the board assembles and advise you of their decision. I trust this will be in time for you, if not, I will call a special meeting, but as they are quite uncertain in coming, did not want to if it could be avoided.

Yours very truly, WM. S. PEROT, JR., *Tr.*

477 Mr. WIMBERLY: We next offer the minutes of council, and duly certified, of June 27th, 1894, found on page 109 of the printed record:

Minutes City Council, June 27, 1894, Repudiating Contract.

Page 246, Minutes, Book 2.

City council of Dawson. Call meeting of the city council of Dawson held this June 27th, 5 p. m., 1894.

Present: A. J. Baldwin, mayor; Aldermen Bishop, Melton, Davis, Rainey and Dean.

Meeting called to order and election returns for aldermen to supply vacancy occurred by resignation of J. W. F. Lowrey were read declaring John S. Lowrey duly elected, whereupon he was introduced and duly sworn into office.

The matter of purchasing the Dawson water works was next considered. Several letters and answers relative to same were read and considered and after thoroughly discussing the same, Alderman Davis introduced the following resolution:

Resolved that the city of Dawson decline to carry out the contract as to water for city purposes of the former council with the Dawson Waterworks Co., and that a committee be appointed to make such arrangements as will be satisfactory with the council and waterworks Co.

His honor appointed on said committee Alderman Davis and Dean, whereupon it was moved and carried that Mayor Baldwin act with said committee.

There being no further business meeting adjourned.

A. J. BALDWIN, *Mayor.*

J. W. PEDDY, *C. C. C.*

STATE OF GEORGIA,
Terrell County.

CLERK'S OFFICE, CITY COUNCIL OF DAWSON, GA.

478 I hereby certify that the foregoing page hereto attached contains a true and complete transcript of such parts of the records of said city as are therein set forth.

I further certify that I was regularly elected and sworn in as clerk of the city council of Dawson, Ga., and am now clerk of said council and as such have the care, custody and control of its records.

In testimony whereof, I have hereunto set my hand and affixed my seal of office, at Dawson, Georgia, this the 25th day of May, 1899.

[SEAL.]

L. C. HOYL,
Clerk City Council.

Mr. WIMBERLY: There will be matters of rebuttal, we won't offer them for the present.

Mr. GUERRY: Minutes beginning on page 110, you don't offer them?

Mr. WIMBERLY: I don't say we don't offer them.

Mr. GUERRY: You don't offer them now?

Mr. WIMBERLY: That does not add very much to the record anyhow. If we should get in a little rebuttal evidence there would not rest any duty on us to put in all the rebuttal at this stage. We might for convenience run into rebuttal without specially intending it. We will keep straight on. We will put in the minutes of the city council of Dawson, found on pages 110 and 111 and top of 112 of the printed record; also page 113.

479 *Minutes City Council of Dawson.*

Page 160, Minutes, Book 2.

Regular meeting city council of Dawson, March 13th, 1893.

The minutes of the last meeting were read and confirmed.

Present: Mayor Baldwin; Aldermen Melton, Kendrick, Deubler Rainey, Hannah and Kaigler.

Page 161. The petition of Mechanics Fire Company No. 2 with names of their members were received and by vote of council they were recognized as a legal fire company for the city of Dawson.

A. J. BALDWIN, *Mayor.*

Confirmed.

J. L. JANES, *C.*

Page 209. Regular meeting city council Dawson, Ga. Nov. 6, 1893.

Present: A. J. Baldwin, mayor; Aldermen Rainey, Davis, Bishop and Dean.

Page 210. Moved that city clerk be required to secure of the clerks of the various fire companies a list of all members in good standing and hand same over to Marshal Arnett.

P. 211.

A. J. BALDWIN, *Mayor.*
J. W. PEDDY, *Clerk.*

Page 285. Regular meeting of the city council of Dawson, Ga., March 4, 1895. 7:30.

Present: A. J. Baldwin, mayor; Aldermen Bishop, Melton, Dean, Davis, Rainey and Lowrey.

P. 286. Motion was made and carried that the most active members of fire department be invited to meet with the city council next Friday night, March 8, 1895, to discuss the matter of reorganizing and bettering the condition of the fire department.

C. J. WHITEHEAD, *C. C. C.*

Page 287. Adjourned meeting of the city council, this March 8, '95.

Present: A. J. Baldwin, mayor; Aldermen Dean, Davis, Bishop, Lowrey, Melton, Rainey.

Mayor Baldwin stated the object of the meeting, to-wit: to discuss the condition of the fire department and to take some
480 action to better the condition of same. A motion was made and carried that the mayor be authorized to appoint a committee of two from the council including himself and two from each of the fire companies to meet as early as possible.

Alder-an Dean was appointed to serve on committee with mayor.

(On margin of same page is found following entry:)

On committee from fire department. Mechanics, B. C. Adams and R. A. Bishop; Protection, Deubler and Clark.

No further business council adjourned.

A. J. BALDWIN, *Mayor.*
C. J. WHITEHEAD, *C. C. C.*

Page 289. Regular meeting of the city council, Dawson, Ga. April 1st, 1895. 7:30 p. m.

Present: A. J. Baldwin, mayor; Aldermen Dean, Bishop, Lowrey, Rainey and Melton.

The fire department committee consisting of Mayor Baldwin and Ald. Dean reported meeting held by the committee March 21, 1895, which was read and placed on file.

(P. 290) C. J. WHITEHEAD, *C. C. C.*

Page 426. Regular meeting of the city council this Feb. 7th, 1898.

Present: W. B. Cheatham, mayor; Aldermen Deubler, Dean, Jennings, Davis, Lowrey.

By motion 50 exemptions from street tax *was* allowed to the fire companies.

By motion the chairman of the fire committee was instructed to publish for samples and prices on fire hose and report at next meeting.

W. B. CHEATHAM, *Mayor.*
(P. 428.) C. J. WHITEHEAD, *C. C. C.*

Page 432. Regular meeting of the city council, this April 4th, 1898.

Present: W. B. Cheatham, mayor; Aldermen Lowrey, Deubler, McNulty, Jennings, Davis.

By motion the fire committee were authorized to order cells for guard house.

The fire companies reported that F. W. Clark was elected chief and C. Deubler, assistant chief of the fire companies.

W. B. CHEATHAM, *Mayor.*
(P. 433.) C. J. WHITEHEAD, *C. C. C.*

STATE OF GEORGIA, }
Terrell County. }

CLERK'S OFFICE, CITY COUNCIL OF DAWSON, GA.

I hereby certify that the foregoing pages hereto attached,
481 contain a true and complete transcript of such parts of the records of said city as are therein set forth.

I further certify that I was regularly elected and sworn in as clerk of the city council of Dawson, Georgia, and am now clerk of said

council and as such have the care, custody and control of its records.

In testimony whereof, I have hereunto set my hand and affixed my seal of office, at Dawson, Georgia, this the 25th day of May, 1899.

[SEAL.] L. C. HOYL,
Clerk City Council.

Minutes of City Council of Dawson, Ga.

Page 458, Book 2.

Call meeting of the city council, this Dec. 22nd, 1898.

Present: W. B. Cheatham, mayor; Aldermen Dean, Duebler, Davis, Jennings, Lowrey, McNulty.

The meeting was called for the purpose of winding up the business of present council, and any other unfinished business.

(Page 459.) The fire committee made the following report:

The fire committee.

Chairman Deubler, of the fire committee, submitted a report showing the improvements made in that department, each item of expense, and the fires that occurred during the year. The report contains much that is interesting, and is as follows:

At the beginning of the year 1898 we found that the city had no organized fire department, the engine house was in a delapidated condition, the fire engine needed repairing badly and there was very little good hose on hand.

We organized two fire companies, one white and one colored, each company having twenty-five members.

The cost of repairs on the engine house have been as follows: Lumber, $16.91; iron track for door, $1.50; door rollers, $2; hinge hasp, 20 cents; nails, 25 cents; 2 dozen bolts, 30 cents; padlock, 20 cents; Wm. Patterson for work on engine house and painting door, $4.15. Total, $41.76.

The repairs on the engine, new hose and other expenses have been as follows: American Fire Engine Company, suction hose, $119.36; machine hammer and padlock, $1.05; 1 broom, 35 cents; 1 barrel lime, $1; American Fire Engine Company, repairs on engine, $10.95; lard oil, 1½ gallons, $1.55; 1300 feet fabric hose, waxed thread, 2 shut off nozzles, two play pipes, 5 rubber coats and spanners, 50 fireman's badges, $1022.96; freight on fire supplies,
482 45 cents; printing 50 copies by-laws for fire company, $3; 1 gallon oil, hotel fire, 20 cents; watchman for fire, April 14th, $1.70; telegrams sent by mayor to fire departments of Albany and Americus, $2.74; repairs on hose reel, $4.55; total, $1,169.36.

We have on hand in good condition about 1500 feet of hose. Lost 500 feet at hotel fire.

The following are the fires and alarms of fire for the year 1898: March 14, Gen. Laing's stable and crib, loss $100, no insurance; April 6, dwelling on Main street, loss $15, insured; April 14, Farnum hotel, loss $6,000, insurance $5,200; April 14, Perry's negro house, loss $150, insured; April 14, Perry's wagon yard shed, loss not known; April 14, Masonic hall, loss $1,000, insurance, $750; April 14, Kenney's dwelling, loss $700, no insurance; April 14, Loyless' dwelling, loss, $1,500, insurance, $1,000; Baldwin & Co.'s mill, loss not known; May 7, Parks' dwelling, loss, $1,000, insurance, $900; May 29, false alarm; June 8, McClelland's dwelling, loss $2,500, insurance, $1,000; June 19, Grier's dwelling, loss, $3,000, insurance, $2,750; June 8 Henry Butler's restaurant, no loss; Sept. 20, Lee's residence, loss $2,500, insurance, $1,800; Sept. 20, A. B. Hamilton's residence, loss, $500, insurance, $500; Sept. 29, Wiley Baldwin's building, loss, $200, no insurance; Dec. 13, oil mill, no loss; Dec. 18, Fulton's house, loss, $1,000, insurance, $750. Several false alarms are not mentioned.

Respectfully submitted,

C. DEUBLER, *Chairman.*
W. B. CHEATHAM, *Mayor.*
C. J. WHITEHEAD, *Clerk.*

STATE OF GEORGIA, }
Terrell County. }

CLERK'S OFFICE, CITY COUNCIL OF DAWSON, GA.

I hereby certify that the foregoing page hereto attached, contains a true and complete transcript of such parts of the records of said city as are therein set forth.

I further certify that I was regularly elected and sworn in as clerk of the city council of Dawson, Georgia, and am now clerk of said council, and as such have the care, custody and control of its records.

In testimony whereof, I have hereunto set my hand and affixed my seal of office, at Dawson, Georgia, this the 25th day of May, 1899.

[SEAL.]

L. C. HOYL,
Clerk City Council.

483 Mr. WIMBERLY: We offer now the Code of the City of Dawson, as appears on pages 119 and 120 and part of page 121, of the printed record:

Code of the City of Dawson, pp. 39, 40, and 41.

ARTICLE 111, CHAPTER XI.

Fire Regulations.

SEC. 89. The fire department of the city shall consist of Protection Fire Company No. 1, and such other companies as may here-

after be formed and created by the city council, or created under the forms of law.

SEC. 90. Each company now in existence, or hereafter to be formed or created, shall have power and authority to make and establish a system of by-laws, rules and regulations for the government of its members, and amend the same at the will of the company, provided that nothing contained in the said by-laws, rules and regulations, or amendments thereto, shall be in conflict with the charter, or any ordinance of this city; and every such company in existence, or hereafter to be formed, shall have power to fine or expel any of its members for violation of any by-law thereof, or any of the provisions of this chapter.

SEC. 91. Each of said companies so long as it exists, shall be empowered to take charge and have the care and management of its respective engine house, engine, hose, ladders, hooks and other apparatus for extinguishing fires, that already has been or may hereafter be provided by the city council for them.

SEC. 92. The members of the fire department, whenever there shall exist more than one company in said city, shall annually, on the third Monday night in January of each year, assemble
484 together in the council chamber, in said city, and elect from their own body a chief of the fire department and also elect an assistant chief and report the names of the parties elected to the next regular meeting of the city council, and said election shall be approved by the city council before said officers enter upon the discharge of their duties. Vacancies in said offices shall be filled as speedily as possible in the manner hereinbefore pointed out.

SEC. 93. At all fires the chief of the fire department shall have absolute command of the fire department and the entire apparatus that may be employed for extinguishing fires; and in his absence, the assistant chief shall exercise the same authority. In the absence of both, upon the foreman of the senior engine company present.

SEC. 94. Said chief shall examine, not less than twice in each year, the engine houses, engines, hose and all and every other apparatus belonging to said department, and make a written report to the city council of the condition of the same, and suggest needed improvements and repairs upon the same, and shall in all case- cooperate with the foreman of the company *upon* whose engine house, engines or apparatus needs repair.

SEC. 95. The chief shall order out, at least once in each year, all companies in the fire department for inspection and drill.

SEC. 96. All fire wells or cisterns made for the use of the fire department shall from time to time, be carefully examined by the said chief and defects therein reported by him to the chairman of the fire committee.

SEC. 97. The chief of the fire department shall report all defective flues, stove pipes, chimneys, combustible matter or any other thing that is likely to cause fires, to the chairman of the fire com-

mittee, who shall at once present the matter to the city council, who shall at once have the same removed or remedied and
485 made secure.

SEC. 98. The fire companies of said city, when the chief is elected, shall prescribe a uniform for the chief and assistant chief, so they may be easily distinguished from the officers and members of the companies.

SEC. 99. It shall not be lawful for any person to wilfully *to* injure, molest or in any way interfere with any cistern, engine, hose, hose cart, truck, water cart, hooks, ladders or other apparatus, implement or material of any kind, character or discription connected with, or belonging to the fire department. Nor shall it be lawful to use any of said implements except for the benefit of the city. The loaning of any of said implements to private parties is strictly forbidden. I- shall not be lawful to ring the fire alarm, or use the fire bell, except in alarms of fire and to call the companies together on their stated and call meetings. Any person violating any of the provisions of this section, shall be punished as hereinafter prescribed.

SEC. 100. It shall not be lawful for any person to, in any manner, obstruct the entrance to any engine house in use or under the control of the fire companies of this city, and any person violating this section shall be punished as hereinafter prescribed.

SEC. 101. All appropriations made for the use and benefit of the fire department of this city shall be first recommended by the fire committee and voted upon by the city council, and regularly passed and warrant drawn therefor, expressing the purposes minutely in said warrant.

486 Mr. WIMBERLY: We now offer pages 117, 118 and part of 119, of the printed record, being minutes of the city council of Dawson, September 18th, 1894, etc. including the report of the managers:

487 Adjourned meeting of the city council called to order by Mayor Baldwin.

SEPTEMBER 18TH, 1894—7:30 p. m.

Aldermen present: Bishop, Lowrey, Melton, Rainey, Davis and Dean.

Object stated as in former meeting under date of Sept. 14th, 1894.

The following resolution was introduced and read:

Resolved that a notice be published in the Dawson News calling for an election by the citizens of the city of Dawson to determine whether the city shall issue thirty-five thousand dollars' worth of bonds, or so much thereof as may be necessary to erect or purchase waterworks and electric lights for said city. There shall be seventy of said bonds of the value of five hundred dollars each. Said bonds shall bear interest at the rate of six per cent. per annum and are to

be paid as follows: Ten thousand dollars of them at the end of ten years; ten thousand at the end of twenty years and fifteen thousand at the end of thirty years. The interest on said bonds to be paid annually. Action deferred until the regular meeting of the council on the first Monday night in October.

There being *no further business* the council adjourned to meet first Monday night in October, same being the next regular.

J. W. PEDDY, *C. C. C.*

Regular meeting of the city council of Dawson, held Oct. 1st, 1894, 7:30 p. m.

Present: E. L. Rainey, mayor *pro tem.;* Aldermen Bishop, Lowrey, Dean and Davis.

Minutes of last regular and called meetings read and confirmed.

Resolution relative to the issuing of $35,000 worth of bonds to purchase or erect water works and electric lights read and adopted.

Adjourned meeting called to order this Oct. 4th, 1894, 7:30 p. m.

Mayor A. J. Baldwin, presiding; aldermen present: Bishop, Davis, Rainey, Dean, Melton and Lowrey.

By motion an election was ordered to take place Wednesday, November 14th, 1894, on bonds or no bonds to purchase or erect waterworks and electric lights. Amount of bonds to be $35,000. Adjourned.

J. W. PEDDY, *C. C. C.*

Regular meeting of the city council of Dawson, held November 5th, 1894, 7:30 p. m.

488 Present: A. J. Baldwin, mayor; Aldermen Dean, Bishop, Rainey, Davis, Lowrey and Melton.

The minutes of last regular and call meeting read and confirmed.

The following resolutions were read and adopted, to-wit: Resolved that the election ordered for November 14, '94, to determine whether the city shall issue $35,000 of 6 per cent. bonds for the purpose of buying or erecting a waterworks system and an electric light plant is hereby reconsidered and an election for that purpose and same amount bonds is ordered for Dec. 12th, 1894. Adjourned.

J. W. PEDDY, *C. C. C.*

Call meeting of the city council of Dawson, held December 13th, 1894, 6:30 p. m.

Officers and members present: A. J. Baldwin, mayor; Aldermen Dean, Davis, Bishop, Lowrey, Rainey and Melton.

Minutes of last regular and call meeting read and confirmed.

The new- elected officers being present, to-wit: A. J. Baldwin,

mayor; aldermen, J. G. Dean, W. H. Bishop, W. H. Davis, as in keeping with the election returns which were read and concurred in and ordered placed on file took each the oath of office for the ensuing year.

There being no further business council adjourned subject to call of mayor.

J. W. PEDDY, *C. C. C.*

(I copy from pages 265 and '6 of Book 2, city records, the election returns referred to above.)

GEORGIA, }
Terrell County. }

We the undersigned managers who held the election this day for mayor and three aldermen, clerk and treasurer of the city of Dawson, Georgia, on the 12th day of December, 1894, for the ensuing year and for the vote on bonds or for and against bonds to be issued by the city council of Dawson do certify that on counting out the votes cast at said election for Mayor A. J. Baldwin, 373 votes; Alderman J. G. Dean, 370 votes; Alderman W. H. Bishop, 369 votes; Alderman W. H. Davis, 321; Alderman B. C. Adams, 34; city clerk of city council C. J. Whitehead, 227 votes; J. W. Peddy, 147 votes; for Treasurer R. L. Saville, 366 votes; for bonds votes polled, 298; against bonds votes polled, 55.

We hereby certify that A. J. Baldwin is duly elected mayor of the city of Dawson for the ensuing year, and that J. G. Dean, W. H. Bishop and W. H. Davis were duly elected aldermen for two years. That C. J. Whitehead was duly elected clerk of the city council for one year and that R. L. Saville was duly elected treasurer for one
489 year and that the vote on bonds as stated in foregoing certificate is correct to the amount of votes cast for and against bonds and we leave the matter of the success of bonds with the vote to the city council as the result *all* of said election with copy of list of voters and tally sheet is furnished to the city council.

Dawson, Georgia, December 12th, 1894.

CHARLES DEUBLER, *F. H.*,
M. G. STAHAM, *F. H.*,
J. M. SIMMONS,
N. P. and ex-Officio J. P.,
Managers.

STATE OF GEORGIA, }
Terrell County. }

CLERK'S OFFICE, CITY COUNCIL OF DAWSON, GA.

I hereby certify that the foregoing eight pages hereto attached, contain a true and complete transcript of such parts of the minutes

of the meetings of the city council of Dawson, Georgia, as are herein set forth as copied from the records of said city council, which records are in my custody, care and control as present clerk of the city council of Dawson, Georgia. I further certify that I have been elected as said clerk, and qualified as such, and am now performing the duties of said office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said city, at Dawson, Georgia, this the seventeenth day of May, 1899.

L. C. HOYL,
[SEAL.] *Clerk City Council, Dawson, Ga.*

490 Counsel for complainant here stated to the master that he desired to introduce the testimony of F. A. Ruggles, as rebuttal testimony on account of the fact that witness desired to leave the city of Dawson for Alabama, where witness was engaged in work.

The MASTER: I want to accommodate counsel and witnesses as far as I can; and I think I shall hear this witness now, that is, allow his evidence to be taken down without ruling upon its admissibility at this time.

Mr. WIMBERLY: If it is not admissible when they put in their evidence, your honor could exclude it.

The MASTER: Yes, sir.

F. A. RUGGLES, sworn by the complainant, testified as follows:

(By Mr. WIMBERLY:)

Q. Where do you reside?
A. City of Dawson.
Q. How long have you resided here?
A. Nearly 19 years.
Q. What business are you engaged in?
A. At present contracting and building.
Q. You were here, were you not, about May and June, 1886?
A. Yes, sir.
Q. From then on until about February, 1890, where did you live?
A. I have lived here going on 19 years—right here in the city.
Q. Consecutively?
A. Yes, sir.
Q. Did you know Mr. R. L. Bennett?
A. I am quite familiar—acquainted with him, yes, sir.
Q. Did you see him at the time he came down here and made the contract with the city—his contract with the city?
A. I saw him, yes, sir, about that time.

491 Q. Were you here, after that, at the time the waterworks was erected?
A. Yes, sir; I was here when they were being put in.

Q. During the time—were you here at the time of the election that was held on the question of waterworks?
A. Yes, sir.
Q. About June, 1886?
A. Yes, sir.
Q. From then on, June, 1886, until the time of this contract with Bennett, what was done, if anything, with reference to getting the town a system of waterworks?
A. Why, I understand that Mr. Bennett got the franchise and sold it to the waterworks Co.
Q. What is that, Mr. Bennett got the franchise and sold it to the waterworks company?

Objected to his understanding.
Mr. GUERRY: It is a written transaction.
The MASTER: Your objection is well taken.

Q. What publicity was given to the efforts to secure a waterworks for the town?

Objected to as irrelevant.
The MASTER: I will admit that at this stage of the case.

WITNESS: There was, I think it was advertised and published in the paper a number of times, the election generally, I think.

Mr. GUERRY: I object to that because it is going into the contents; and it is already in in proper form.

Q. The Dawson News, has that paper a general circulation here and was it at that time?
A. Yes, sir.
Q. State from your knowledge as a citizen at the time what amount of publicity—how generally it was known amongst the people?

Mr. GUERRY: I object to that. Your honor has not ruled on the question of going into what was in the newspaper.
The MASTER: I understood the question was withdrawn.
492 Mr. WIMBERLY: I don't insist upon the contents of the newspaper.
Mr. GUERRY: I object to it on the additional ground that the witness cannot give an opinion as to the amount of publicity.

Q. What you knew, heard and saw?
A. Every one I had any conversation with, greater number of citizens here understood it and all seemed to be in favor of having the waterworks, they said.

Mr. GUERRY: We object to what the citizens said.

Q. Was it generally discussed?
A. Yes, sir.

The MASTER: I will reserve my ruling on that question.

Q. During the time that elapsed after Bennett made the contract and before work was actually begun, state how generally it was discussed and known amongst the citizens here?

Mr. GUERRY: I make the same objection to that.
The MASTER: Very well, sir.

WITNESS: Every one that I had conversation with seemed to be in favor of having the waterworks put in.
Q. How general did you hear it discussed?
A. Every citizen that I met with. It was generally discussed all over the city. Every one I met seemed to be willing or well pleased that the waterworks, things of that kind, were being put in.

Mr. GUERRY: We object to those answers.
The MASTER: I rule out what the citizens favored. I will admit so much of the testimony going to show that it was publically discussed and known to the citizens of this city.

Q. Generally, was it discussed between you and the citizens with regard to what the citizens said? How general was that discussion?
A. I don't remember at the time, only I thought it would be a great——
Q. You need not state what you thought. As a fact, was
493 it generally discussed and known?
A. What I thought was a fact. I thought it was beneficial.
Q. Not asking you that. You understand the question? What I want to get at is whether it was generally discussed and known among all the citizens or a few?
A. Every one that I had any conversation with on the subject, seemed to be——
Q. That many or a few?
A. A greater number of citizens—majority.
Q. What I mean, were the citizens generally discussing it or was it a subject that you didn't hear much about?
A. Yes, sir; think I said that. I taken it to be.
Q. The facts I am talking about?
A. That's facts. I am going to state the facts as near as I can. It has been a good while.
Q. Were you here when they were building the waterworks?
A. Yes, sir; I was.
Q. Do you remember how long they were in progress?
A. I could not tell you exactly, somewhere between 4 and 5 months, I think. I could not say positively.
Q. Describe in a general way how noticeable that work was—how extensive it was over parts of the city?
A. Well, I say when I had any spare time I was always near the trenches where they were putting in the pipes. Quite a number of citizens were looking on. Never heard any dissenting voice about their being put in.

Q. Those pipes that were put in you say you saw citizens standing around?

A. Quite a number of them at various times.

Q. Prior to the erection of the waterworks what fire protection did the city have?

A. Had somewhere in the neighborhood of 6 or 7 cisterns—reservoirs.

Q. What was the amount of protection from those?

494 A. They gave very good protection in the neighborhood where they were erected.

Q. How many altogether?

A. I could not tell you exactly. I think six.

Q. These cisterns was the entire protection to the city?

A. I can count them up readily—they were put in here during my residence as a citizen.

Q. Is there any water protection—any water pressure in these cisterns or do you have to wait until the engine steam up?

A. No water pressure in the cisterns.

Q. Were you present when the system was tested?

A. Yes, sir.

Q. The waterworks system?

A. Yes, sir.

Q. Who witnessed that test?

A. I could not tell you.

Q. A good many or a few?

A. Looked like all the citizens in the city turned out. Seemed to be a well known event.

Q. How was the water thrown at that test?

A. Thrown from hydrant pressure.

Q. Do you remember how high?

A. Tested at one place on the corner of Lee and Main streets, at Mr. Baldwin's corner, and throwed it a number of feet above the highest part of the building.

Mr. WIMBERLY: We are asking these questions as on rebuttal; but reserve the right to object to the competency of these questions. Your honor would not hold our asking them at this stage of the case acted as a waiver to object to like questions. Your honor will not rule them admissible now; but simply allow them to be taken down so that it can be offered by us if the other side should go into it?

Mr. GUERRY: You are going into it in rebuttal now; and you could not object to our going into it on direct examination.

Mr. WIMBERLY: I am doing this to relieve the witness at

495 this stage.

The MASTER: Any testimony that I think is not admissible, I shall not admit it, no matter how it is offered or when it is taken down.

Mr. WIMBERLY: Your honor won't consider that we offer this part

of it? We are merely having it taken down so that we can offer it later.

The MASTER: Any testimony taken down becomes part of the record in the case.

Mr. WIMBERLY: I will withdraw that last question then.

Mr. GUERRY: What particular question is that, as to how high the water was thrown.

Mr. WIMBERLY: We merely took it down to offer it in the event we saw fit. Your honor allows us to withdraw it?

The MASTER: Yes, sir.

Cross-examination.

(By Mr. GUERRY:)

Q. You say that nearly everybody you talked to or heard talk was talking about the building of the waterworks, who did you talk to about it in those days?

A. I could not call their names at this time. It has been sometime. Every citizen I had any conversation with at all seemed to be in favor of it.

Q. Can you name any of them?

A. No, sir; I could not at this time.

Q. Could you state the number of them?

A. Just general conversation with the citizens.

Q. Could you state the number of them?

A. No, sir; I could not.

Q. Nor the names of any of them. I understood you to say that you could not state the names of any of them?

A. It was about 8 or 10 years ago and I could not remember it.

496 Q. You can't state the names of any of them?

A. I could after thinking sometime.

Q. You can't now?

A. No sir; I could not call the names of any of them. Just general conversation with the people at the time.

Q. You spoke of the fire protection in the city before these waterworks, they had an engine then, didn't they?

A. Yes, sir; a fire engine.

Q. Got one now?

A. Yes sir.

Q. Was the fire protection very good where it was about the town?

A. Wherever the cisterns where they had very good fire protection.

Q. How many cisterns did they have?

A. To the best of my recollection six.

Q. Six scattered about over the town?

A. Sir?

Q. Six scattered about over the town?

A. Well, in certain districts—certain parts of the town.

Q. They were distributed with a view of fire protection to the town?
A. To the principal part of the town.
Q. Those cisterns were built how long before this election took place, about 4 or 5 yoars, wasn't it, before the contract was made with Bennett?
A. Longer than that, I think.
Q. Four or five or six years?
A. I could not say exactly the year. They have been erected since I lived in the city. I have lived here going on 19 years in December; and it was 5 or 6 years before that time.
Q. Do you remember what year it was?
A. No, sir; I could not tell you.
Q. These cisterns—do you remember when the city council took steps to have waterworks?
A. Yes, sir.
Q. By resolution?
A. Yes, sir.
497 Q. Those cisterns were built then?
A. No, sir; before that.
Q. Not talking about this contract, do you remember about these resolutions dated 1886—when they built these cisterns wasn't it about 1886, about the time they had the election or just after?
A. No, sir; I think they were built some 5 or 6 years before they had the election on waterworks. Something I have not paid any attention to at all, about the dates of it. I guess the city has a record of the year they were constructed. Something that did not interest me.
Q. Which Bennett was it that came here that you said you knew, were there two of them?
A. R. L. Bennett was the only one that I knew of.
Q. He came here?
A. Yes, sir.
Q. When was he here?
A. I could not tell you that. I never kept any record of it.
Q. To the best of your recollection when did he come here?
A. The first I knew of him was when he came as civil engineer on the railroad, the Columbus Southern, it was called. He helped survey that through.
Q. Your brother-in-law—kinsman?
A. Yes, sir.
Q. What year did he come to Dawson—has he ever come here but once?
A. He was here a number of times.
Q. When did he first come?
A. I could not tell you that. The first time I knew of him was when he came through here surveying the Columbus Southern Ry.
Q. Do you remember the tank—I mean the original tank tha

was constructed here—did they have a reservoir to hold water for the city?

A. Which, the waterworks?

Q. Yes?

A. Yes, sir.

Q. Did you have anything to do with the tower being torn down and cleaning it out?

498 A. Had considerable trouble in taking it down.

Q. And cleaning it out?

A. Didn't clean it out. I removed the timbers.

Q. Didn't you see it cleaned out?

A. No cleaning it out about it. Just removed the timbers.

Q. There was a good deal of filth and mud in it?

A. Some sediments in the tank when I moved it.

Q. It was 5 or 6 inches deep?

A. Four inches.

Q. Four inches?

A. Yes, sir.

Q. Very foul mud, wasn't it?

Objected to as irrelevant.

The MASTER: I have a good deal of doubt about this evidence, but I will admit it at this stage.

Q. Wasn't it very filthy and muddy? Wasn't it foul?

A. It had sediments from the——

Q. Answer the question: Wasn't it foul and muddy?

A. Yes, sir; it was foul and muddy.

Q. Wasn't it over four inches deep?

A. I never took a rule to measure it. I have a pretty good eye as to size, depth or dimensions. I don't think it was over four inches.

Q. It was that much, wasn't it?

A. Yes, sir.

Q. How high was the bottom of the tank from the ground that this mud was in?

A. About 62 or 63 feet, I think. I think the timbers were some 60 feet long off the ground sir—65 perhaps.

Q. What date was that—fix the date as well as you can?

A. When I took that down?

Q. Yes?

A. I could not tell you the date exactly.

Q. What year was it?

A. I can't tell you that. I never made any recor- whatever of it. I could refer to my time table and tell you. Sometime in October but the year I don't remember.

Q. Just after this suit started in the United States court—after the injunction was granted?

499 A. I could not tell you that, sir.

The MASTER: According to my view this testimony is inad-

missible. I have allowed it to be taken down. I shall give you an opportunity during the progress of the case to show me wherein it is admissible and that I am wrong in my ruling that it is not admissible; otherwise, I will rule it out.

My view is this: The city having chosen the source of supply and having formally authorized this company to use that source, is estopped from complaining as to the character of the water. I hold further: If it is alleged and can be proven that the company either caused or permitted by its own negligence or fault the water to become contaminated, by not providing proper protection around the source of supply or in any other way, any evidence on that point, I will admit it.

(The hearing then adjourned until the next morning, at 8.30 a. m., Tuesday, March 11th, 1902.)

Second day.

Terrell county court house, Dawson, Ga.

TUESDAY, *March* 11, 1902—8.30 a. m.

The hearing was resumed pursuant to adjournment of yesterday. Present: The master, Hon. W. A. Wimbish; counsel for complainant and respondents, the stenographer; and spectators, witness, etc. in court room.

JAMES H. DAWS, called in behalf of the complainant, after having duly affirmed, testified as follows:

(By Mr. WIMBERLY:)

Q. Mr. Daws, how are you connected with the Dawson Waterworks Co?

A. I am general superintendent.

500 Q. How long have you been general superintendent of that company?

A. Ever since it was built, in 1891.

Q. Who constructed the plant of the waterworks company?

A. The American Pipe Mfg. Co.

Q. Who actually superintended the construction for the American Pipe Mfg. Co.?

A. I did.

Q. What is your business with the American Pipe Mfg. Co.?

A. I am the general superintendent of the American Pipe Mfg. Co.?

Q. How long have you held that office?

A. Since 1888.

Q. You have been connected with the company practically throughout its whole existence?

A. Yes, sir.

Q. What business is the American Pipe Mfg. Co. engaged in?

A. Principally in the construction of waterworks systems, manufacture of water and gas pipe and the——

Q. (Interrupting.) As to the waterworks system, who looks after the construction of waterworks systems for them—I mean what officer of the company has charge of the construction?

A. I have.

Q. And the operation of them?

A. Principally myself, yes.

Q. You say they are engaged principally in the business of constructing waterworks systems, how many waterworks companies have they constructed or interested in?

A. Some 30 or 35. Somewhere in that neighborhood.

Q. Have you yourself superintended the construction of the entire number?

A. I have had charge of the construction of over thirty.

Q. Before you went with the pipe Co. did you ever have charge of the construction of waterworks?

A. Yes, sir.

Q. Mr. Daws, from your knowledge of the subject and you have stated that you have given time to the actual construction
501 and operation of 30 or 35 waterworks systems for the company, and what you have done in that line before, what would you say as to your knowledge and experience in the matter of waterworks systems—are you a practical expert in that line?

A. I have a practical thorough knowledge of waterworks construction.

Q. That is your line of work?

A. Yes, sir.

Q. Coming now to the Dawson Waterworks system, what was the date of your first visit to Dawson?

A. It was sometime during the summer of 1890. The exact date I could not give it to you at this time.

Q. Was it before or after the pipe company—call it pipe company for short, acquired the waterworks contract?

A. Several months prior.

Q. What was the purpose of that visit?

A. Simply to examine the town, its size, and to ascertain if there was really a need in the city for waterworks and whether the people here generally desired a system to be constructed.

Q. Why was it you desired that information?

Mr. GUERRY: I make the point that this evidence is irrelevant and that he is now seeking to find out.

The MASTER: I will let counsel develop his line of examination.

WITNESS: Before we would undertake the construction of a system of waterworks in any city, it is very necessary for us to know whether the system is necessary; and whether the city is large enough to maintain a system of waterworks; and whether the peo-

ple generally wish it; and it was with that view that I visited the town.

Q. You say that was before you actually purchased the franchise?

A. Yes sir; several months.

Q. Were you in negotiations?

A. Only been offered to us.

502 Q. You hadn't decided at that time whether you would accept it or not?

A. No, sir.

Q. How long were you here at that visit?

A. I was here only one day.

Q. What did you do during that trip?

A. I drove all over the city; conversed with quite a large part of the principal merchants on the main street and others.

Q. On what subject did you converse with them?

A. Practically altogether on waterworks subjects.

Q. What was the result of that visit?

A. I was favorably impressed with the town and made a favorable report to my company.

Mr. GUERRY: We object to that on the same ground. Have no right to go into any report he made.

The MASTER: I will let the witness go on.

WITNESS: It was a favorable report that I made my company, which was followed later on by another visit—subsequent visit to the town.

Q. Will you please, as near as you can, give the date of that subsequent visit that you speak of?

A. Late in the fall of '90.

Q. Who came with you on that visit?

A. Our vice president and general manager, Joseph F. Keen, Jr.

Q. What office does he hold with you now?

A. President and general manager of the American Pipe Mfg. Co.

Q. What did you and Mr. Keen do on the subsequent visit that you made?

A. I, in company with him, went over the city and we talked to quite a number of citizens.

Q. Can you fix the date of that second visit?

A. No, sir; it was late in the fall, as I recollect it—late in the fall of 1890.

503 Q. Both of these visits were in the fall or at least during the year '90?

A. Yes sir.

Q. How long were you and Mr. Keen here?

A. One day.

Q. What was the result of that visit?

A. The result of the visit was that on our return to Philadelphia, correspondence was entered into between the pipe company and the city of Dawson relative to the construction of waterworks system

here. We stated to the officials of the city of Dawson that we had been offered the franchise by Mr. R. L. Bennett; and it was our object to ascertain by written replies as to whether they really——

Q. Do you refer to the letters that are in the record now?

A. Yes, sir; wrote several letters. I presume you have them.

Q. They speak for themselves: you need not go into the contents of them. During the time you made the visits can you give a general idea as to how extensive you talked over the matter with different persons in the town?

A. On both occasions the principal business men as I met them along Main street, we talked to and asked questions regarding the wishes——

Q. What opposition, if any, did you find at that time?

The MASTER: How is that material?

Mr. WIMBERLY: It is part of the general allegations of the bill. Your honor remembers about what that line is. I don't care to——

The MASTER: I think you can show the fact that he came here and found a demand, as he has testified; but I don't think you can go into the details.

Mr. WIMBERLY: Without broaching it any further, we can later on argue the admissibility and relevancy of these matters?

The MASTER: Yes, sir.

504 Q. Mr. Daws, after you made that visit what did you do—what further did you do before you undertook the construction of the waterworks down here?

A. The most important matter was to determine the source of supply.

Q. What was done before you undertook to furnish the waterworks?

A. It was settled before we even purchased the franchise.

Q. Why did you settle that first?

A. We considered it was a very important matter; and one that should be settled before we would undertake it, in order to have the source of supply satisfactory—entirely satisfactory to the city; and in order to determine whether we could afford to construct a system from the source of supply thus selected.

Q. After you acquired the franchise of Bennett, does the transfer in the record correctly set forth the price you paid Mr. Bennett or not?

A. No, sir; I think not.

Q. How much did you pay him for his franchise?

A. I could not answer you that question; I am not clear as to that.

Q. You know about how much?

A. It was in the neighborhood of $1000, I believe. The exact amount I could not state at this time.

Q. Had Mr. Bennett any connection with the American Pipe Mfg. Co., or the Dawson Waterworks Company?

A. He had no connection whatever with the American Pipe Mfg. Co. and after the purchase had no connection with the Dawson Waterworks Co.

Q. After you purchased his franchise?

A. No, sir.

Q. Is Mr. Bennett living or dead?

A. Dead, I believe, sir.

Q. What time was it, after you purchased from Mr. Bennett his contract or franchise, did you next visit Dawson?

A. I recollect it was in May. Might have been earlier than that.

Q. You mean?

A. May of '91, yes.

505 Q. What was your purpose on that visit in May?

A. Here ready to commence the construction of the system.

Q. You did commence the construction what time?

A. Probably along about the middle of May.

Q. You were here then engaged in the construction of the system, beginning with that time, how long?

A. Continuously until the system was completed in August, 1891.

Q. Did you personally superintend the construction of it?

A. Yes, sir.

Q. During that time that had elapsed, I will get you to describe in a general way what the work was that was done—how extensive?

A. Pumping station was constructed, land was bought, the water supply tower was erected, pipes were laid nearly through out all the streets of the city—principal streets——

Q. How many miles of pipe?

A. About five miles.

Q. That on the principal streets?

A. Yes, sir.

Q. The main business and residence streets of the town?

A. Yes, sir; I might say all of the leading streets of the city.

Q. In laying pipe what was done—what had to be done?

A. A trench was excavated.

Q. How many hands did you have engaged in doing that work?

A. Sometimes as many as 125 and from that down to a smaller number.

Q. Varied from time to time?

A. Yes, sir.

Q. While that work was going on, was it visible—open to everybody's observation here?

A. Yes, sir; I don't see how they could fail to know that work of that character was in progress.

Q. What was done by the citizens of the town while that work was going on?

A. I could not answer you that question.

Q. What notice did they take of it?

A. Of the work going on?

Q. Yes?

506 A. Seemed to take a very great interest in the work.

Q. Up to that time you discovered no opposition to the work?

A. None whatever. Didn't hear a single sentence in opposition to it.

Mr. GUERRY: We will object to that testimony on the ground——

The MASTER: I am admitting this testimony to the extent of showing the publicity of the work and actual notice to the citizens —that the citizens may have had. I think for the present I will admit it to the extent of showing any acquiescence. I won't admit the testimony in detail on the subject.

Mr. GUERRY: We want our point understood. We say publicity —neither the publicity nor the acquiescence are at all relevant to the case.

The MASTER: I understand your position. You say they cannot make a contract?

Mr. GUERRY: Yes, sir; or ratify it, especially the citizens.

Mr. WIMBISH (the master): I am admitting it on a little different theory.

Q. Mr. Daws, you said something about the city selecting the source of supply, in the correspondence four sources of supply are referred to, what led to the selection of the source that was actually adopted, rather than either of the other three?

A. I personally examined all four sources of supply; and the other three sources were inadequate.

Q. You mean in quantity?

A. Yes, sir. One spring, which is known as the Lee spring, would not exceed a flow of 5,000 gallons in 24 hours in dry season, which of course could not be considered under any pretence. One of the other springs, after wiering it I found it flowed less than——

Q. You mean by wiering it, testing its quantity with a wier dam?

A. Yes, sir.

507 Q. Found how much?

A. Flowed less than 20,000 gallons in 24 hours, which was the spring that helps to feed our present source of supply. The other stream or spring, was examined and found to be very much smaller than the one we adopted, also rather inaccessible.

Q. For the size of the town—the quantity that you would need for this size of town or for this size system, were any of the other three big enough?

A. No, sir.

Q. When you completed the system, what was done?

A. A test was made of the efficiency of the system at that time and formally accepted by the city.

Q. Who was present at that test?

A. As I recall it, a majority of the council—city council was present and conducted the test. Besides the city council, there seemed to be a very large proportion of the population of the town present.

Q. Male population of the town?

A. Yes, sir; a very large crowd of people.

Q. How complete was that test at the time?

A. It was considered at the time very complete.

Q. Was there any further test made?

Mr. GUERRY: I object to the statement as to how it was considered.

WITNESS: It was then very complete, yes sir.

Q. Any further test desired on the part of anybody?

A. No, sir; on the contrary the committee signified their willingness to stop. We invited them to test every plug in the system, if they so desired. They said, after the last plug had been tested, that they were satisfied.

Q. That was what time?

A. August 12, 1891.

Q. What time were the waterworks turned over to the city?

A. On that date.

Q. From and after that date what was done with the system
508 by the city?

A. If I understand the question right I could only answer that they continued to use the system for fire protection.

Q. Were you in Macon after that time prior to the time the litigation began, which I believe was about July '94 or June '94?

A. Yes, sir; in Macon probably a number of times.

Q. What was the purpose of your different visits?

A. On some of my visits to Macon I had private business to attend to and on one or two other occasions I was in Macon, I was on my way to Dawson to attend trial.

Q. I said Macon, I meant Dawson. It was my error in asking the question; I meant to ask you what time you were in Dawson?

A. Been in Dawson quite a number of times.

Q. From that period?

A. Yes, sir.

Q. What was the purpose of your visit to Dawson?

A. After the completion of the works?

Q. Yes, sir; after the completion of the works and prior to the litigation?

A. I stopped here——

Mr WIMBERLY: I withdraw the question as to Macon.

WITNESS: I stopped here on several occasions in order to look into the workings of the system and to see that the business was being conducted properly and that it was giving satisfaction.

Q. During that time was there ever any complaint as to the system?

A. None whatever made to me.

Q. Your connection with the system was known to everybody?

A. Yes, sir.

Q. The correspondence from the city or its officials at that time, relating to the Dawson Waterworks matter, who does that correspondence some before—any letters written?

A. Certain letters may be addressed to the president or
509 treasurer of the company, they would naturally come before them; but I personally oversee all correspondence relative to the work.

Q. All correspondence comes before you?

A. Yes, sir.

Q. Was there any complaint made by letter or correspondence?

A. None whatever, sir.

Q. During that time?

Mr. GUERRY: During what time?

Q. The time that elapsed prior to this litigation—the record shows the date of the litigation—approximately it was the latter part of June, 1894. When were you in Dawson prior to this resolution of June 27, 1894, that is in evidence?

A. I believe in the month of May, 1894.

Q. What transpired during that visit—did you have any conference with anybody on any subject relative to the waterworks?

A. Yes, sir; I looked after the system generally while here; and the principal conversation regarding the waterworks may have occurred between Mr. Baldwin and myself.

Q. What was that?

A. It was in reference to the wish of the city to purchase the waterworks system.

Q. What position did Mr. Baldwin fill at the time he took that matter up with you?

A. I believe he was mayor.

Q. Mayor of the city: What passed between you and Mayor Baldwin?

A. As I recall it, Mr. Baldwin stated to me that it was the desire of the city to own and operate its own waterworks system, believing that they could operate it more economically than they could by purchasing their fire protection from the company; and wished us to fix a price at which we would sell the plant.

Q. As representative of the waterworks company, what did you say to him, if anything, in regard to that proposition?

510 A. I was not in a position to name a price for the plant. I stated to him that when I returned to Philadelphia I would take the matter up with the company and they would write him regarding the sale; that it was always our wish, if the city wished to own and operate its own system, to sell it to them, if we could.

Q. Was there any complaint made at that time in connection with the offer as to the system or the service?

A. None whatever.

Q. Had there been up to that time any complaint?

A. None whatever.

Q. The letters, I believe that took place are all in evidence: this was prior to the correspondence that is in the record?

A. Yes, sir; the correspondence followed in reference to the sale and purchase of the plant.

Q. Shortly after?

A. Yes, sir.

Q. Of course they speak for themselves? Up to the time of this correspondence—you learned of the resolution of June 27th, that is already in evidence (I won't go into the contents of that). What notice had you of any repudiation of the contract or expectation of repudiating it or attack on its validity, anything of that sort?

A. I didn't anticipate any trouble of that kind until served with notice of the repudiation.

Q. After the litigation began in the latter part of June, 1894, you mean?

A. Yes, sir; notice of the repudiation.

Q. Prior to that resolution of June 27, what notice had you of any such purpose or expectation or claim on the city's part?

A. The company had none whatever.

Q. Did you personally have any?

A. No, sir; no intimation of it.

511 Q. Beginning with that time, how long was it after the litigation began, which I believe the record shows to be June 29—resolution was June 27, 1894, how long was it after that before you heard of any complaint whatever as to the service of any character?

A. In 1898, I believe, was the first intimation.

Q. Where were you at that time?

A. In Dawson.

Q. Probably what time in '98?

A. July, I believe.

Q. Were you down here?

A. I was down here attending the hearing of the suit that had been brought for the collection of the rentals for '94.

Q. Was that the first or second hearing of the case—first or last hearing?

A. I think that was the last hearing.

Q. Up to that time you never heard any complaint whatever?

A. None whatever as to the service.

Q. Then the time that elapsed between June, '94 and the date of that trial, July '98, were you in Dawson then?

A. Several times.

Q. For any length of time?

A. Here but one day.

Q. Sometimes longer than a day?

A. I think I have been here two days at a time. Usually one day.

Q. When you were here during those times do you remember seeing generally the people and officials of the city?

A. Yes, sir; met a great number of people.

Q. Had there ever been any complaint during those times?

A. No complaint.

Q. Where is the office of the company—where was the control of the company?

A. In Philadelphia, Pa.

Q. I believe you say that all correspondence comes under your eyes, that is part of your duty as general superintendent: Had there ever been any complaint by correspondence?

A. None whatever.

512 Q. At the time you were down here in July, 1898, when you first heard of any complaint, how long had it been since the city had paid any revenue to the company, under this contract——

Mr. WIMBERLY (addressing Mr. Guerry, of counsel for respondents): I believe your answer makes no denial of the allegation that you paid anything—no contention that you paid anything after January 1, 1895?

Mr. GUERRY: No, sir.

Q. It was then in July '98, 3½ years—more than 3½ years after payments were stopped before you heard of any complaint?

A. Yes, sir.

Q. Was any official complaint made, I mean by the city, or any request that you should do anything?

A. No, sir; no official complaint by the city. I learned of the complaint by being shown some affidavits that had been made by certain parties.

Q. In connection with the law suit?

A. Yes, sir.

Q. What had been your attitude as representative of the company—general superintendent who had control and charge of these matters, towards the city, in reference to the service done here—what had you done in that matter?

A. Our desire was to keep the service and the system in as good condition as we possibly could.

Q. What had you done in that line—in making that known?

A. Will you ask that question again?

Q. What had you done in making your purpose known to the city and its representatives?

A. Well, in conversation with a number of people, I made mention of the fact—I had stated that if it were not for the litigation, when the litigation would terminate, it was the intention of the

company to put in an artesian well here and furnish artesian
513 water in place of the source of supply we were then using, or supply of water.

Q. Had there been any complaint at that time, or been any request during that time for any further analysis of the water or change of the source, or anything of that sort, from the city?

A. No.

Q. Had they had any other analysis made or requested any analysis made?

A. I could not tell you whether they had any analysis made or not. They never requested us to have any made.

Q. If they ever had any other made have they notified the company of it?

A. No, sir.

Q. During all the time this litigation went on who had general charge of its operation, fuel account, salary account and keeping the thing going—superintending those details generally?

A. I superintended the detail work of it myself. The accounts were really in charge of the secretary of the company.

Q. I mean the question of operating it, things of that sort, that comes directly under your supervision?

A. Yes, sir.

Q. As general superintendent of the company?

A. Yes, sir.

Q. State whether or not from that time, after the so called repudiation by the city, in June, '94, the company still continued to furnish fire protection—water for these hydrants?

A. Yes, sir; have continued ever since that time up to the present. Made no change whatever in the service.

Q. After cutting off all the revenues from the water rentals, what effect did that have as to leaving the plant self-sustaining or otherwise—I mean were its revenues sufficient——

Mr. GUERRY: We object to that, what effect it had, the revenue of the company.

514 Mr. WIMBERLY: We think it is the very basis of the equity in the bill here; that the cutting off of the revenue, put the company where it cannot aid itself; and the bondholders——

The MASTER: Is there any allegation in your bill that the effect of that is to take your property without due process of law?

Mr. WIMBERLY: Yes, sir; we have got that allegation in there. That is one of the jurisdictional grounds of the bill.

Mr. GUERRY: No, nothing about taking property without due process of law.

Mr. WIMBERLY: Yes, sir; you will find it on page 39 of the printed record (reading from printed record).

The MASTER: I shall admit this evidence on the ground that the theory of the bill, as amended, is that these people were induced to spend their money here to erect a waterworks system on the faith

of a certain contract with the city. That subsequently the city, by its own ordinance, repudiated that contract, intending to deprive the waterworks company of sufficient revenue to maintain an independent plant; and therefore, to that extent, it was taking their property without due process of law. I express this as the theory of the complainant, as I understand it, and not as my own view. On that theory I will admit this evidence, subject to be excluded.

Mr. GUERRY: We certainly make a motion to exclude it.

The MASTER: You need not make an express motion to exclude it. The testimony will be written out by the reporter and submitted to me; and on the argument you can urge any of these objections.

Q. Cut off the $2000 that the city was to pay?

A. Cut off the city hydrant rentals and left the waterworks company in the position of only having the revenues from its
515 private consumers to maintain its plant. These were insufficient to meet the fixed charges—operating expenses.

Q. Leave anything for betterments, improvements or keeping up the system?

A. None whatever. Not sufficient money to operate it.

Q. What was its effect on the ability of the company to borrow money to keep its system in repair?

A. Made it practically impossible for the waterworks company to borrow any money.

Q. As a result of that, at what time was it—how did it come about that the waterworks company were able to erect its present standpipe or tower here?

Mr. GUERRY: We object to that. Your honor will understand without my repeating the objections, that we object to all the testimony to that effect?

The MASTER: You may show anything subsequently done.

Q. Going back a little in order of time: This waterworks plant, you say you superintended the construction of it?

A. Yes, sir.

Q. Every detail?

A. Yes, sir.

Q. Every detail came before you?

A. Yes, sir.

Q. What did that system cost?

A. About $40,000.

Q. Cost that in round numbers?

A. Yes, sir.

Q. What was the cost of this water tower—what time was that erected?

A. I believe that was completed about May, 1901, probably.

Q. What time was it begun?

A. 1900—May 1900. Work was started about the first of the year, 1900.

Q. And completed about May, 1900?
A. Yes, sir.
Q. What are the dimensions of that standpipe?
A. The tower is 100 feet high and the standpipe is 25 x 25 feet.
Q. That makes total height of the tower?
A. 125 feet.
516 The MASTER: That is to the top of the water level?
WITNESS: Yes, sir.
Q. 125 feet. Taking the water column—the height of the water pressure, it would be how many feet?
A. Be about 125 feet from the base of the standpipe.
Q. How much higher is that than the old one that stood the test?
A. Probably 35 feet. Something in that neighborhood.
Q. What is the capacity in gallons—what is the contents of that water tank?
A. About 90,000 gallons.
Q. What was the old one?
A. The old one had a capacity of about 72,000 gallons. The contract required us to put up a tank of not less than 40,000 gallons capacity.
Q. The present tower, of what material is that constructed?
A. Steel and iron.
Q. Are those materials durable or destructible?
A. About as durable as any material we know of.
Q. What was the cost of this present tower?
A. My recollection is in the neighborhood of $7000.
Q. State whether or not the company has at any time been officially notified of any defect in the system and requested to make any change, enlargement or betterment?
A. Have not been notified.

Cross-examination.

(By Mr. GUERRY:)

Q. You say you examined these springs?
A. Yes, sir.
Q. You mean by that that you went and looked at them or did you test their capacity.
A. Yes, sir; I tested their capacity.
Q. When was that?
A. I made an examination of the springs in the fall of 1890. Also examined them in the spring of '91.
Q. What time in '91 did you examine them?
517 A. The last examination I made was probably in May '91.
Q. You are familiar then, ever since that time, how the water is supplied in the tower and the pumping station?
A. Yes, sir.

Q. Is it not a fact that nearly all of the water from which you get your supply is not spring water but branch or creek water?

A. A small branch that has been selected as a source of supply, rises within about one half a mile, as I understand it, and is made up entirely of small springs that flow into the main branch.

Q. I am speaking about these particular springs that were analyzed—I will read them to you, as I get it from the resolution put in evidence: Spring No. 1 is about 14 or fifteen hundred feet above the bridge?

A. That is a portion of the present supply—flows into the present supply.

Q. The Dunn spring, No. 2, is from the creek just three feet above the bridge?

A. What spring is that?

Q. Dunn spring, No. 2, is from the creek just a few feet above the bridge?

A. That is Dunn spring, as I understand it. It is the one known as the Dun- spring.

Q. That is the second one, just a few feet above the bridge, what about that one?

A. That is a regular spring. It is our present source of supply.

Q. That's a spring, it says?

A. They are all called springs in that letter. Probably refers particularly to this stream.

Q. This is a resolution I am reading from—resolution of council says "Dunn spring." What spring was that?

A. That was the first spring, as I understand it.

Q. The Dunn spring?

A. The Dunn spring is No. 1.

Q. Spring No. 3, Lee's spring, east side of the creek about
518 300 feet this, or town side? Is that one of them that supplies——

A. No, sir. That flows into the main stream a short distance below our pumping station. Has an average flow in the summer of about 5000 gallons in 24 hours.

Q. You say that comes in below the pumping station?

A. Yes, sir.

Q. That don't furnish any part of the water?

A. No, that spring does not, as I understand it.

Q. No. 4 is the Farrar spring, in farm about 1200 feet west of bridge. Is that part of the supply?

A. No, sir. The spring there is a small stream flowing through the Farrar farm.

Q. You don't get any water from that at all?

A. No sir.

Q. The only springs you get any water from is the Dunn spring?

A. Get water from the Dunn spring and quite a large quantity of water that flows in from various other springs in this branch.

Q. Any of these springs described here?

A. Not the Lee spring nor the Farrar spring. Neither of these two, I understand, come into our supply.

Q. Is it not a fact that these two springs that you say contribute to this water supply, they are almost an infinitesimal portion of the water supply?

A. No, they furnish all of the supply.

Q. Is there not a branch or a creek there of considerable size?

A. It is a flowing stream of water right through this little valley.

Q. How far up from the pumping station or your tank is the farthest spring?

A. I have not been to the headwaters of that branch. I am told——

Mr. GUERRY: I object to anything that you were told. Did not ask for anything except what you know.

519 WITNESS: From general observation of the drainage area of that section, should not think it exceeded over half a mile, the general contour of the land.

Q. Isn't it true that this branch extends way up beyond all of these springs that you speak of—these two springs that you spoke of?

A. Extends above the Dunn spring, yes, sir. That is the spring furtherest up the branch referred to.

Q. Is there not a very considerable stream way above the springs?

A. It diminishes as it goes up the valley.

Q. Very considerable above the springs, is there not?

A. Considerable water flows above the spring. Greater quantities come in below the springs—below the Dunn spring. The stream is quite small at the Dunn spring.

Q. Is there not a regular stream or a creek way above that spring big enough for a fishing stream—big enough for fishing purposes?

A. I could not tell you. I have not been to the headwaters. I would not think that the fishing grounds are very big in there.

Q. Don't think it is big enough?

A. Might have very small fish in it.

Q. Is it not true that there is a swamp in there, through which this stream or creek runs, after you get beyond the cleared land, above the pumping station, say clear up to the original—farthest source of this stream, is there not a dense, heavy, muddy swamp?

A. It is, you might say, woodland, low land, similar to what we find in a great many sections. I have not been all through it.

Q. Is there not a heavy, thick swamp all through that creek bottom?

A. There is considerable swampy land there.

Q. Is there not a dirty, heavy swamp there?

A. Don't think so. No more so than any other.

Q. Not asking you for comparisons: Isn't it a dirty swamp
520 up there?

A. I would not consider it so, sir.

Q. Muddy, isn't it?

A. Muddy if you get into it, yes.

Q. I wish you would describe to the master how the waters are conducted from these springs into this branch?

A. Flow naturally into the branch, you know.

Q. They are not conveyed from the springs in conduits of their own into the water supply?

A. No, that would be practicaliy impossible, being a great number of small springs.

Q. They run, these springs, all of them, that is including these two, run in open ways—natural open ways into this branch or creek, don't they?

A. Yes, sir.

Q. And then it runs down, this creek, for a considerable distance from the last spring, that is the one nearest the pumping station, and thus the waters are conveyed into the acqueduct?

A. Run probably 600 or 800 feet, perhaps a 1000 feet, below the Dunn spring. There are springs that intersect the branch between say the inlet and the Dunn spring. The Dunn spring is about 1000 feet above our inlet.

Q. Then between your inlet and the Dunn spring you say there are some other springs?

A. Yes, sir.

Q. Those springs described in this correspondence or resolution?

A. No, sir.

Q. These springs supply this branch in open natural way?

A. Yes, sir.

Q. They are uncovered?

A. Yes, sir.

Q. All of these springs referred to in the correspondence and the resolution and these other springs that help to supply this water all run into this branch and then runs some distance before it reaches your inlet pipe?

A. Only one spring that is referred to in this letter of the city's enters this branch above our inlet. Only one.

Q. That's what I understand. That's the only way any
521 spring supplies you water at all, that is, through that inlet?

A. Yes, sir.

Q. So the only spring mentioned in this correspondence and this resolution is the one spring that runs into this branch which is made up of these other springs way above the supply of water, by going partially into this inlet pipe, is that true?

A. Our water supply is made up of the two locations indicated by the city—embraces two of them. The other two are outside of our water supply.

Q. You don't answer my question?

A. I didn't understand it probably then, sir.

Q. What I want to know is this: That is the only spring mentioned in this resolution and this correspondence, together with other

springs not included with these others mentioned in the correspondence and resolution, run into this branch?

A. Yes, sir.

Q. This branch goes some distance to the point where a portion of the branch goes into your inlet pipe?

A. Yes, sir; that is our source of supply. That is one of the sources selected by the city and the one we took.

Q. All of the springs that run into this branch and the branch itself, it is open until it reaches your inlet pipe?

A. Yes, sir.

Mr. WIMBERLY: What other springs do you refer to?

Mr. GUERRY: All of the springs running into it at all.

Mr. WIMBERLY: Into what?

Mr. GUERRY: Into the branch.

Mr. WIMBERLY: I don't think the questions asked by counsel make it clear just what he is inquiring about.

Q. Now the inlet pipe conveys only a very small portion of this stream into your tank, doesn't it?

A. Certain seasons of the year it requires the full flow of
522 the stream.

Q. That is when the water is very low?

A. That is during the time we are pumping. Of course when the pumps are idle, then the stream continues to flow by.

Q. Ordinarily the branch has a great deal more water than is necessary?

A. Some seasons of the year.

Q. There is not 1/20th that goes into the inlet pipe?

A. During pumping today I should say probably 1/5th of the water was being utilized.

Q. Was being used out of that branch?

A. The water.

Q. This spring that you spoke of, the Dunn spring, that you say runs into this branch, that supplies a very small portion of this water?

A. At the time I weired the stream it was flowing about 20,000 gallons a day. I can't say whether it increases any in wet weather or not. It may increase or it may not.

Q. That spring supplies a very small part of the quantity of water contained in this branch—flowing into this branch?

A. In damp seasons of the year, for instance, at present, there is quite a considerable flow in the lower stream. If the Dunn spring does not increase in ratio with the other springs, it would form at this season of the year a very small part of the flow. If it increases in ratio with the others, I suppose it would be relatively as it is in the summer time.

Q. You don't know how that is?

A. No sir.

Q. Is it not true that the entire branch and the springs and the

natural outlets from these springs, are all open; and when you have running surface water it goes into these springs or outlets from the springs, and especially into this branch, from the entire swamp and hill sides on both sides way up to the source of this branch
523 above all the springs that you mentioned. Isn't that true?

A. It will flow in to a certain extent. There has been ditches opened on either side in the neighborhood of the inlet so as to catch the worse flow of the water from the cultivated fields and carry that away from the branch and enters the branch near the highway. The natural outlet of these waters would be this branch.

Q. Doesn't that entire bottom overflow very considerably when you have considerable rains?

A. I have never seen it overflow. It may do it.

Q. Doesn't it overflow 3 or 4 feet above the banks of this stream?

A. I could not tell you of my own knowledge, I have never seen it.

Q. Isn't that branch at times six feet deep?

A. I could not tell you, sir. I should not think so by the position of the banks near our pumping station.

Q. That is below where I am talking about?

A. There would be a greater volume of water at that point than above.

Q. Doesn't it overflow so that that branch is a swimming——

A. I could not tell you. I have never seen it. The banks I speak of——

Q. Constructed as this arrangement is there for supplying water, is it true that the water from the hillsides, when you have a considerable rain, flows into that branch, and the water thus flowing is not conducted away before it reaches the branch. Isn't that true?

A. A portion of that water would reach the branch above our source of supply.

Q. Is it not true that on the west side of this stream above the mouth of your inlet pipe, opposite where these springs are and opposite this branch, there are five or six settlements where people live and have their farm houses and their lots and stables; also their privies? Is that not true on the hillsides?

524 A. Four or five little—probably three, as I recall it, probably three houses on the west side of that highway. Our source of supply, I should think—the nearest building above our inlet would be at least 1000 feet away.

Q. Whatever the distance may be, take the three places that you speak of, doesn't the surface water from those places go into this branch and into your inlet pipe above these short ditches that you speak of?

A. I have never carefully examined the contours there to see whether that water would flow toward the branch or whether it would flow in the other direction. A portion of that farm is on a divide and a portion of that water would go in the other direction.

Q. I am speaking about this water from the yards and lots and

privies of these places, doesn't that flow down into this swamp and into this branch—the surface water?

A. There may be some drainage from one or two of those places that would reach the swamp. Not positive of that.

Q. You don't know and could not state positively?

A. Those houses are situated, as I recall it, on a divide; and a portion of that flow might go to the swamp.

Q. Do you remember the length of those ditches, how far above your tank they reach?

A. The tank is not there. It is the pumping station.

Q. The pumping station, I mean?

A. These ditches were constructed to reach several hundred feet.

Q. About 100 yards?

A. Probably so.

Q. Now don't you know that these three places that you are talking about are more than 300 feet from there, the swamp, at this inlet pipe—mouth of this inlet pipe?

A. Those houses don't parallel this stream.

Q. I am not asking you about paralleling it. They are there on the hillside, ain't they?

A. What I mean by paralleling, to find the distance they
525 are above this inlet, we would take the stream at right angles and locate the house by them and get the distance they are above the inlet. These houses are practically built on a road running east and west. This stream runs, as I take it, north and south, as compared with the road.

Q. Are not these three houses described by you, these places on the hillsides whose washings go into this swamp?

A. The houses may have a small amount of washings that go into the swamp.

Q. That is above the highest point of those ditches you speak of, further up towards the source?

A. It may be, but I doubt it.

Q. You have not got a reservoir down there?

A. No, sir.

Q. As is referred to in this newspaper clipping or publication?

A. No, sir; have no reservoir.

Q. What proportion of the water that is supplied to the city of Dawson year in and year out, what portion now of the entire supply, is furnished by the Dunn spring?

A. That would be a very difficult question to answer.

Q. Is there a one-thousandth part of it?

A. I would not be competent to answer that question without a daily measurement of that stream.

Q. You could not say whether it would be a 1000th part of it, or more or less?

A. No, sir.

Q. What other spring described in this resolution that I read to

you a description here, goes into that water supply except the Dunn spring?

A. Our present water supply is one of the locations give us by the city. Gave us the privilege of constructing our system there.

Q. What other as described in this resolution and this correspondence put in evidence from which these samples were
526 taken, what other spring goes into the water supply besides the Dunn spring?

A. Spring No. 2. What is known as No. 2.

Q. What do you call that one?

A. Present source of supply.

Q. What other?

A. That and the Dunn spring are the only two of the four that we utilized.

Q. The other two don't go in there at all?

A. As I recall it they do not.

Mr. WIMBERLY: The resolution, what they call spring No. 2, is no spring. Two is a creek above the bridge.

The MASTER: I am listening to the testimony.

Q. You say you had a conversation with Mr. Baldwin, the mayor, here, about the purchase of this waterworks property?

A. In May '94, yes, sir.

Q. That was in May '94?

A. Yes, sir.

Q. Was it by correspondence or conversation?

A. Conversation, sir; and correspondence followed later.

Q. Now you speak of the original suit that was brought here: What suit was that you referred to in your direct examination?

A. I am in error about it being the original suit. I don't recall——

Q. What suit—whose suit was that?

A. The suit for the hydrant rental for the year '94, I referred to.

Q. Who was the suit in favor of, the one you refer to?

A. Dawson Waterworks Company.

Q. Now you say you never heard of any complaint about this water until '98?

A. Not about the service, sir, none whatever.

Q. What do you mean about the service, the quality of the water?

A. The quality of the water and the ability to furnish fire streams as contemplated in the contract.

Q. And the quality of the water?

A. Yes, sir.

527 Q. You represented the company here at that time, didn't you?

A. Yes, sir—that is, I was not the local superintendent.

Q. You had control and you directed this suit to be brought—you prosecuted it for the company, didn't you?

A. The company directed the suit to be brought.

Q. You represented the company in and about the suit?

A. Yes, sir.

Q. As its superintendent. Let me refresh your recollections: In the plea filed to that suit in November '96, the first term of the court after it was brought, don't you know that part of the defense was predicated upon the fact that the water was not good—unfit for use intended under the contract?

A. No sir; I don't recall ever hearing that or seeing that. I didn't read the plea personally, and not being a lawyer I didn't read the plea and was not called to our attention. To the best of my knowledge the question was not raised at the time.

Q. If it was raised in that plea you disremember it?

A. No, sir; I don't recall it being discussed by the attorneys on either side.

Q. Who were the attorneys that represented that case—who were the attorneys that represented you in that case?

A. Hall & Wimberly.

Q. And Mr. Parks?

A. And Colonel Parks. Steed and Wimberly instead of Hall.

Q. Who employed counsel in this case?

A. The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company.

Q. Who had the Columbia Avenue people to employ counsel in this case?

A. They employed them themselves.

Q. At what time, do you remember? When this case was decided in the supreme court of Georgia, was it not?

A. Yes, sir.

528 Q. In which the contract was held to be void?

A. Yes, sir.

Q. Counsel in this case——

Mr. WIMBERLY: I don't think that is a proper question to ask the witness, as to what the supreme court held. The highest evidence of their holding——

The MASTER: I would——

Mr. WIMBERLY: I ask to rule out that last question and answer as referring to the decision of the supreme court.

Mr. GUERRY: Of course I will put that decision in. I want to ask this witness if counsel were employed in this case by the complainant, the Columbia Avenue people, subsequent to that decision, to file this bill?

The MASTER: I presume the purpose of your question is to show that this is a collusive suit?

Mr. GUERRY: That is one purpose.

The MASTER: Is there any other purpose of this testimony—this line you are now investigating on?

Mr. GUERRY: Yes, sir; we propose to prove that it is practically the same proceeding in another name. Perhaps your honor's suggestion might cover the idea. I don't know as it would entirely.

The MASTER: The record of the case in the supreme court of Georgia, which you have in evidence here, and the record in this case, would disclose those facts, wouldn't it?

Mr. GUERRY: No, sir; don't show when they were employed. Shows when the bill was filed, of course.

The MASTER: Shows the cause of action?

Mr. GUERRY: Certainly.

The MASTER: You may show that the questions originated in that proceeding. That is as far as you can go on the question of *res adjudicata.* * * *

The MASTER: I will allow any evidence that I may con-
529 sider material on the question of notice or assignment. I can see how that would be admissible. As to the matter of collusion that only affects the jurisdiction of the court. Hasn't that question been passed upon by the court of appeals; and hasn't the circuit court taken jurisdiction because of the Federal question raised? * * *

The MASTER: I will let you bring out evidence on the question of assignment or notice.

Mr. GUERRY: That is one of our points; that this court has no jurisdiction of this subject matter. It is a suit on an assigned claim.

Q. When was counsel employed in this case, after that decision?

A. I could not say positively. I think they were.

Q. What connection have you with the plaintiff in this suit, you understand, the Columbia Avenue—such a long name I will call them the plaintiff?

A. No connection with them whatever, sir.

Q. You have any business relations with them?

A. None whatever.

Q. Nor the Dawson Waterworks Company?

A. The Dawson Waterworks Co. with the Columbia Avenue?

Q. Yes?

A. What way—what business relations?

Q. Any relation to this litigation—what has transpired between them heretofore?

A. The only business relations the Dawson Waterworks Co. had with the Columbia Avenue Co., originally the Columbia Avenue was made trustee for the bondholders of the Dawson Waterworks Co.

Q. When this suit was brought—the original suit by the Dawson Waterworks Co. in '96, when that suit was brought in '96 or '95, what did the Columbia Avenue have to do with the litigation then?

A. Nothing whatever.

530 Q. After that, when did they find out about the existence of this litigation?

A. They were notified of the decision of the supreme court.

Q. Not speaking of any formal notice?

A. That's the only knowledge they had of the suit having been pending, to the best of my knowledge and belief.

Q. Not asking you about your belief, so far as your knowledge extends, when did they first get notice of the pendency of the suit of the Dawson Waterworks Co. in this court, here in this county?

A. I don't know of them having notice of it until——

Q. You don't know about that?

A. Not until after the decision of the court.

Q. Well, now, I understand, so far as your knowledge extends, the Dawson Waterworks Company had charge of the original litigation and all these demands against the city of Dawson for water rentals up to the decision of the supreme court of Georgia already referred to?

A. Up until the termination of the suit, yes, sir.

Q. In the supreme court?

A. Yes sir.

Q. The Dawson Waterworks Co. were claiming the rentals and making demands and controlling these rental claims until after that decision?

A. Until that decision was rendered, yes.

Q. Then after that the Columbia Avenue was notified and this transfer of the right to sue, as made by the Dawson Waterworks Co., was then made?

A. No, sir.

Mr. WIMBERLY: Put in the transfer. I think the transfer would be the highest and best evidence.

Mr. GUERRY: Not asking about the contents. Asking about the date of it.

Mr. WIMBERLY: I think you should specify what transfer you refer to.

531 Mr. GUERRY: I am referring to the action of the Dawson Waterworks Co., by which the Columbia Avenue took control of these rentals—demands for these rentals and brought these suits.

WITNESS: If you will allow me to go back and give you a short history of that proceeding at that time, I could probably set you clear.

Mr. GUERRY: No objection to that.

WITNESS: The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Co., had no knowledge whatever of the pending suit by the Dawson Waterworks Co. until after the decision of the supreme court. During the pendency of that suit, in order for the Dawson Waterworks Co. to meet the interest on its bonded indebtedness, had to borrow money from the American Pipe Mfg. Co., with which to meet that interest; and it continued to borrow money until the adverse decision of the supreme court of Georgia. The American Pipe Mfg. Co. then declined to loan the Dawson Waterworks Co. any more money on that account; and the American Pipe

Mfg. Co. deemed it its duty then to notify the Columbia Avenue Saving Fund people of this decision of the court of Georgia. The Dawson Waterworks Co., as I recall it, did not notify them, but the American Pipe Mfg. Co., as it was the original purchaser of the bonds. Then there resulted from that the action of the Dawson Waterworks Co., as set forth in the bill here, by which the control of these rentals was turned over to the Columbia Avenue Co.

Mr. GUERRY: I object to that as being irrelevant. What I am really after is getting the date of the action of the Dawson Waterworks Co., because my brother in putting these proceedings in his bill left off the date. If we can agree about that, then there will be——

532 Mr. WIMBERLY: The secretary lives in Philadelphia and our idea was to prepare depositions and prove that by depositions.

The MASTER: Any dispute as to the date?

Mr. WIMBERLY: No, that resolution attached to this bill was dated some date in March or April, subsequent to the decision of the supreme court in the Dawson Waterworks Co. case. I don't remember the date exactly.

Mr. GUERRY: It was subsequently?

Mr. WIMBERLY: Yes, sir. I know as an independent fact that when I went to Philadelphia to confer with the trustee I saw all these records and noticed them.

The MASTER: The date of it you don't remember. Was it subsequent to the decision of the supreme court of Georgia?

Mr. GUERRY: The date of the action of turning over these rentals and the right to make demand, etc., as set forth in there was subsequent to that time?

Mr. WIMBERLY: Yes, sir; subsequent to the decision of the supreme court of Georgia, in the Dawson Waterworks Co. case.

Q. The pipe company, what connection have they with the Columbia Avenue?

A. None whatever, sir.

Q. They are bondholders, are they not?

A. The pipe Co.?

Q. Yes?

A. Not bondholders of the Dawson Waterworks Co.

Q. They have no claim against the Dawson Waterworks Co. at all, have they?

A. They have no bond claim. They have for money advanced the Dawson Waterworks Co. with which the Dawson Waterworks Co. could pay the interest on their bonded indebtedness. Loaned some money to the Dawson Waterworks Co.

Q. That company owns the controlling interest at this time—controlling stock in the Dawson Waterworks Co., the pipe Co.?

A. The pipe Co. have the controlling interest in the stock of the waterworks Co.

533 Q. And have all the time had it?

A. Yes, sir.

Q. Have you advanced all this interest—the money to pay the interest on the bonds up to the time you mentioned?

A. The waterworks Co. borrowed money from the pipe mfg. Co. The stock is held for its voting power—practically all the value of the stock, in order to control and direct the management of the company.

Q. The American Pipe Mfg. Co. knew of the pendency of this litigation all the time up until the final result described?

A. They did know that. That is, they loaned it money.

Q. Furnished money to pay the interest on that account?

A. Loaned the Dawson Waterworks Co. money from time to time for that purpose.

Q. The interest had been paid by your company, the Dawson Waterworks Co., up to and beyond the time when this suit in this particular case was instituted, isn't that a fact?

A. Not up to and beyond that time.

Q. Wasn't any interest due when this bill was filed in this case by the Columbia Avenue?

A. I believe there was some.

Q. How much interest? What interest?

A. Not positive, probably one year.

Q. Which year?

A. Could not be clear as to that, probably the year '99. I would not be positive.

Q. When was the bill filed—when did that interest become due?

A. Became due on the first of January and July of each year.

Q. Hadn't that been paid before this bill was filed—what is your recollection about that?

A. No. My recollection is that up until the termination of the suit in the supreme court of this State, that the water Co. borrowed money with which to pay that coupon interest due on the bonds. At

534 the conclusion of the suit, as I recall it, there was some money due on the coupon interest and they attempted to borrow money and the American Pipe Co. refused, under those conditions, to loan them any more money; and then notified the Columbia Avenue Saving Fund.

Q. When did the interest become due?

A. I believe it is July and January.

Q. I will call your attention to the affidavit of Mr. Hodge, there. Explain that item. You may be correct about it. It is on page 141 of the printed record. It says to 5/12—to May 12, 1899. Mr. Hodge's affidavit is made on the 31st day of May?

A. This is an abstract of the books up until the 12th day of May, 1899, evidently.

Q. That interest had been paid up until then?

A. It may have been. May have paid the interest on the first

day of January, '99. I would not state. I could not state as to that, sir. Not thoroughly clear on that last period.

Q. Do you know what particular officers employed counsel in this case, of the Columbia Avenue Co.?

A. I do not, sir. I presume the president of the company.

Q. I asked you for your information?

A. John K. Cumming, I believe.

Q. Do you know what the contract is as to the compensation of counsel?

A. No, sir.

Q. And who is to pay it?

A. The Columbia Avenue. I presume they will pay it.

Q. I didn't ask you for any inferences or presumptions.

The MASTER: How is this testimony relevant? He says he does not know.

Mr. GUERRY: Our understanding was that the Dawson Waterworks Co. employed them, practically.

Mr. WIMBERLY: That is not correct.

535 Mr. GUERRY: I don't know whether it is correct or not. He does not seem to know.

Q. Now you say the new tower was begun the first of May?

A. I believe it was completed about May, 1900, sir.

Q. Completed first of May, 1900?

A. I think in the month of May. Sometime during the month of May.

Q. Were you here when work was begun on the tower?

A. No.

Q. When it was torn down?

A. No, sir.

Q. What was the capacity of the former tower?

A. About seventy one or two thousand gallons.

Q. The last one was 90,000 gallons?

A. Yes, sir.

Redirect examination.

(By Mr. WIMBERLY:)

Q. Mr. Guerry asked you about the source of supply, No. 1 spring, Dunn's spring, No. 2, creek above bridge, what supply do you actually use?

A. We use supply No. 2 just above the bridge, which of course embraces waters from spring No. 1.

Q. Spring No. 2, what is spring No. 2?

A. Running stream.

Q. No spring there?

A. No, sir.

Q. Just call that a spring?

A. Yes, sir. I was shown that as one of the source- of supply by the mayor at the time.

Q. Did you adopt the source shown you?

A. Yes, sir.

Q. It was the creek above the bridge as shown in here?

A. Yes, sir.

Q. You adopted exactly the source that was shown you?

A. Yes, sir.

Objected to as leading.

Mr. WIMBERLY: I will try and not lead.

Q. State whether or not the actual location of your inlet there was known to the mayor and council at the time?

A. Known to the mayor.

Q. Who acted for the city in the matter?

536 A. The mayor was the mouthpiece of the city.

Q. Who was mayor at the time?

A. W. B. Cheatham.

Q. Do you know what his profession was, a physician?

A. Practicing physician and druggist.

Q. State whether or not there is any water goes into your inlet other than the supply the city selected or designated?

A. No, because our inlet pipe is fed by the source of supply selected by the city.

Q. You spoke of some houses a thousand feet or such a matter from that swamp, were those houses there when you selected your source?

A. Probably were, yes. When we adopted the source of supply. We didn't really select it.

Q. You say when it was adopted: State whether or not there has been any change in the location there in any way since the city selected it?

A. I don't know of any change.

Q. Mr. Daws, Mr. Guerry called your attention to the contents of a plea—portion of a plea, dated November '96—I believe that is the date of the plea, state whether or not you were at that hearing and heard the witnesses sworn on the stand?

A. I was.

Q. If there was any such plea in the case was there any evidence offered in support of it?

A. None to my knowledge. None whatever.

Q. You heard all the witnesses sworn?

A. Heard all the witnesses and heard all the arguments.

537 J. A. HORSLEY, sworn on behalf of the complainant, testified as follows:

(By Mr. WIMBERLY:)

Q. What is your connection with the Dawson Waterworks Co.?
A. I am their local superintendent.
Q. How long have you held that position?
A. Since August, 1891.
Q. Since it was organized?
A. Yes, sir.
Q. August '91?
A. Yes, sir.
Q. Have they ever had any other local superintendent except yourself?
A. No, sir.
Q. Where do you reside?
A. In Dawson.
Q. How long have you resided here?
A. Since '80, September 13th.
Q. Do you look personally after the duties of the office of local superintendent?
A. Yes, sir.
Q. In a general way, what are your duties relative to the Dawson Waterworks Co.?
A. I superintend their works and keep—make their collections and keep their books. Report all matters to headquarters concerning the works.
Q. Were you present when the works were being constructed?
A. Yes, sir; I was in Dawson.
Q. As a citizen here?
A. Yes, sir.
Q. Had you any connection with it at that time?
A. No, sir; had no connection with it at that time.
Q. Were you present when the works were tested?
A. Yes, sir.
Q. Who conducted that test?
A. Mr. Daws.
Q. On behalf of the company?
A. Yes, sir.
Q. Who were the representatives of the city?
A. Sir?
Q. Who were the representatives of the city?
A. I don't remember, Mr. Wimberly.

538 Q. Who was present when the test was made?
A. Quite a number of people. I could not remember now. I remember some of the council and perhaps Captain Kaigler, Mr. Deubler perhaps. My recollection about the members of the council—Dr. Cheatham, perhaps. Not sure about it.
Q. In a general way, what was the nature of the test?

A. It was tested thoroughly at the different plugs and location of the works.

Q. What do you mean by testing—what was done?

A. Hose attached to the fire plugs and water thrown through them.

Q. Did you see the height of the stream?

A. Yes, sir.

Q. State whether or not it was satisfactory?

A. Seemed to be, sir, by all that was present.

Q. You say the works were completed in '91; did you remain in charge after that time on the ground in Dawson?

A. Day before the test was made—I think it was the day before—anyhow, the day or the day before the test was made, Mr. Daws sent for me to come to the hotel; and he and I contracted for me to take charge of the work?

Q. He employed you as local superintendent?

A. Yes, sir; and stated to me that a test would be made, best of my recollection, the next day; and he would expect me to be on hand; and the works would be turned over to me.

Q. They were turned over to you from that time?

A. From the date of the test.

Q. What time did the city accept them, as of what date?

A. From that date, is my understanding

Q. From and after that date state whether or not the waterworks company has furnished the service?

A. Yes, sir; furnished the service.

Q. State whether or not from and after that date the city has used it?

A. Yes, sir.

539 Q. Every year since?

A. Yes, sir.

Q. Prior to the resolution of June 27, 1894, so called the repudiation of the contract, had you ever heard any complaint as to the service?

A. No, sir; never heard any complaint of the service.

Q. After that date while that litigation was pending, state whether or not any complaints were made?

A. How is that?

Q. After that, '94, along until the trial of that case, Nov. '96, I believe it was, state whether or not there were any complaints as to the service?

A. None that I remember of.

Q. You were the local superintendent in charge here?

A. Yes, sir.

Q. State whether or not at any time any official complaint was ever made to you on behalf of the city?

A. Official? No, sir.

Q. During the time that elapsed you have had a good many fires in the city?

A. Yes, sir.
Q. Have you kept a record of those fires?
A. Yes, sir.
Q. Can you get the use of that record and tell us how many fires there has been, since the first or January, 1895 up to May 1, 1899?
A. I could not tell you right now. I can refer to my record and count them up.
Q. Have you your record here?
A. Yes, sir; laying over there on a chair.
Q. There were during those four years some 25 or 30 fires, such a matter?
A. I guess we had some 25 or 30 fires.
Q. In those different fires water was used to *distinguish* them all?
A. Yes, sir.
Q. State whether or not the waterworks company furnished the service to the city for fire protection?
A. Yes, sir.
Q. Do you know the operating expenses of the company
540 and its receipts, I believe you said you collected the money and remitted it to Philadelphia ever since they first commenced?
A. Yes, sir.
Q. State whether or not the revenues of the Dawson Waterworks Co.,) exclusive of the $2000., hydrant rental by the city, is enough to pay the operating expenses of the company—its fixed charges?
A. It is not.

Objected to—
The MASTER: Upon the same ground that you objected to the testimony before?
Mr. GUERRY: Yes, sir.

Q. Do you know anything as to the quantity of property saved from fire during this period— What position are you in?
A. I am in the real estate business.
Q. Have you any acquaintance with the fire insurance business during that period?
A. I was in the fire insurance business a short time only. I don't remember now——
Q. About what time?
A. As I started to say, I don't remember, Mr. Wimberly.
Q. You were in it awhile?
A. Just a short while.
Q. Are you familar as a real estate agent and fire insurance agent with property values here in Dawson?
A. I guess I am.
Q. How long have you been in the real estate business here?
A. 12 years.
Q. Can you give a general idea as to the amount of property saved from destruction by fire by the use of this water during the

four years I asked about—any particular fire, if you wish to be more specific?

Objected to as irrelevant.

The MASTER: If you can show that they used the water, you may show the value of the property involved.

541 Q. How much was the value of the property?

A. I don't understand you.

Q. What was the value of the property that was involved or in danger by any of those fires that were extinguished by this water from January 1st, 1895 to May, 1899?

A. I considered the fire of April——

Q. Of what year?

A. '99, was one of the most hazardous.

Q. '98, wasn't it?

A. The Baldwin block fire—'98 fire. April 14, I considered that the most hazardous fire we had.

Q. How much was in danger in that fire?

A. I suppose—it seems to me at least forty or fifty thousand dollars.

Q. What part of the town?

A. It was——

The MASTER: In this investigation here I want to give you my idea about it. I think it is material to show the fact that they used this water—that it was used in a number of fires; and then approximately the value of the property involved, upon the idea that the city was exempting from taxes, under this contract, this company, in consideration of this fire protection. Only the amount is admissible under that view of the case. I don't think it material or relevant to go into particular fires.

Q. During that time state whether or not there were fires that endangered any large amount of property in the city, in which the water of this company was used?

A. Yes, sir.

Q. Extinguished with this water?

A. Yes, sir.

Q. Was there, or not, during that time, '95, '96, '97, '98 and '99, in which the water was not used?

A. No, sir.

Q. Used every year?

A. Yes, sir; every year.

Q. During that time what complaint was made, if any—state whether or not during that time the company was ever called upon to make any other test of the water or to change its source

542 of supply, anything of that sort?

A. No, sir.

Cross-examination.

(By Mr. GUERRY:)

Q. What do you mean by saying that during all this time and up to the time the suit was brought that the water was furnished and used all the time?

A. I mean to say that in every fire in reach of the fire hydrants the fire department of our town used the water furnished by the Dawson Waterworks Co.

Q. Do you not know that on the contrary the fire company or fire department never acted as such, but that the citizens would assemble and do it; and that prior to that time the city council had forbid the use of the water so far as the authorities were concerned?

A. There was a volunteer fire department in our town for several years and at every alarm given that volunteer department would turn out.

Q. Do you know that the city had them to do that—the city itself?

A. Well, sir——

Q. Either permitted or authorized them to do it?

A. Well, sir, the city council furnished this fire department certain things—various things to use about——

Q. When was that?

A. It was during the years '96, '97 and '98, perhaps.

Q. What did they furnish them with?

A. Furnished them with hose and a reel to carry the hose.

Q. Didn't the city have an engine here and cisterns?

A. Yes, sir.

Q. Didn't the hose have to be used in that way?

A. Didn't use the engine but 2 or 3 times.

Q. In using the engine they would have used the hose and the cisterns, would they not?

543 A. Yes, sir; but they got the hose to the engine and attached the hose to the plug.

Q. They were things that could be used in that manner with the engine and cisterns?

A. Yes, sir. They could be used by both.

Q. Didn't they use that engine in the fire of '98 that you spoke of?

A. Used it only a short time. The engine broke down about the time of the worse fire. The suction pipe got out of order at the cistern.

Q. Then what you mean to say, that while the city had repudiated and renounced this contract, it had furnished this volunteer department with the things that you have mentioned, and these volunteer firemen, when they would have a fire, would go forward and volunteer to use the plugs of the waterworks company, ain't that what you mean?

A. Used the hose.

Q. Attached the hose to the plugs of the waterworks company?
A. Yes, sir.
Q. Without any direction on the part of the city council as a body?
A. Well, sir, I don't know that to be true.
Q. You don't know whether they authorized them or not?
A. The city council?
Q. The city council as a body?
A. Had been carried on like it had been before that.
Q. You didn't catch my question: After the renunciation of this contract, do you know that the city council ever authorized anybody to use this water of the waterworks company?
A. I don't know that it was done under the direction of the city council.
Q. You remember, of course that the then mayor, A. J. Baldwin, interviewed you in January, 1895, after the renunciation of this contract in '94, and stated to you that the city had discontinued the use of the water?
A. What's that question.

(Question read to witness by stenographer)

544 A. Did he do that officially?
Q. Didn't he tell you that while he was mayor?
A. I don't think he did it officially, sir. He might have made some remark about the city not going to use the water.
Q. Didn't he tell you that?
A. I think not officially.
Q. Didn't he tell you that?
A. He might have said that.
Q. Don't you know that he said that to you?
A. I could not be positive about that.
Q. What is your best recollection?
A. Something said about the city council going to try to repudiate the contract.
Q. Didn't he tell you that it was repudiated in January '95, and wouldn't use the water any more?
A. I think not.
Q. What did he tell you?
A. I don't remember.
Q. Said something to you about not using the water any more and also something about repudiating the contract in that conversation?
A. I could not remember that conversation. It has been several years ago. I didn't make any record of it.
Q. Didn't he mention those subjects?
A. He might have done it.
Q. He was mayor at the time, wasn't he?
A. I suppose so,
Q. Don't you know whether he was mayor then or not?

A. I say I suppose he was.

Q. Don't you know it?

A. Yes, sir; I know it; but he didn't notify me officially, as I understood it.

Q. He just notified you?

A. I don't know that it was a notice. Talked about the people or the city was going to try to repudiate the contract, or something of that kind. I don't remember the conversation.

Q. What did he say about using the water?

A. I don't remember, sir.

Q. Don't you know what he said on that subject?

A. No, sir.

545 Q. You didn't hear about any trouble about the service—the water service or supply of this company, from '94, up to the time this bill was filed in '99, I believe it was? Didn't hear any trouble or complaints among the people using this water trying to put out fires?

A. About the first time, is my recollection, was the Witchard and Green fires up here.

Q. When was that?

A. That was in June, '99—June 11, '99, is my recollection—either '98 or '99.

Q. Didn't Mr. Baldwin tell you along during that period of time at different times that there wasn't sufficient pressure, in talking about this matter? Didn't he tell you that prior to the renunciation of this contract in '94—didn't he tell you the pressure was insufficient?

A. I don't remember.

Q. Don't you know on several occasions during this period that the water was not even running out of your hydrant at your home?

A. No, sir.

Q. Ain't that a fact?

A. No, sir. Several times early in the morning the pressure went down several times.

Q. When was that?

A. That was—I think it was about 3 or 4 different times.

Q. During what period?

A. My recollection is now that it was during the summer of 1900 and may be '99 and 1900, during the very dry season.

Q. It was run down so low there was no pressure?

A. Yes.

Q. It would not run out of your hydrant?

A. Several times that way early in the morning.

Q. How many times was it that way?

A. I suppose 2 or 3 times.

Q. You noticed it?

A. Yes, sir. From the fact that some of the consumers turned on their sprinklers and allowed them to run all night. As soon

546 as I discovered that I would start the pumps agoing. That would be early in the morning.

Q. What private sprinklers did that?
A. Which ones?
Q. Yes?
A. Various ones.
Q. Give the names of them?
A. I don't remember the names of them.
Q. Don't remember who they were?
A. No, sir; private consumers I know of some of them.
Q. Didn't you forbid the use of the sprinklers at all because the water was so inadequate?
A. During one time during the summer—I forget what year it was. It was an extreme dry season.
Q. What year was that to the best of your recollection?
A. I don't remember. I think it was about May '98 or '97, somewhere along there, I asked the people to shut the sprinklers off.
Q. Why did you do that?
A. Because of the extreme dry weather, which diminished the stream of water and it got low.
Q. How many times was that?
A. Only once or twice.
Q. Now was that a different time from the one—from when you noticed it in the morning, about its being so low—I believe you said that was on several occasions?
A. You see when the water went down so low, we had to keep our tank full for fire protection, and once or twice we would not allow the sprinklers to be used to keep our tank full.
Q. Were they the same occasions that you discovered in the morning——
A. No, sir.
Q. Different occasions?
A. Yes, sir; different occasions.
Q. There was 4 or 5 times when the supply was in that condition during those years?
A. No, sir. You misunderstand me. Only once or twice our stream got so low I requested the sprinkling stopped. These other times I had plenty of water. Our tank would be full at
547 night; and private consumers would turn their works loose and run them all night on their yards and gardens.
Q. Who did that?
A. Different ones. I can give you the names of all the sprinklers in town by referring to my books.
Q. I asked you for the names of the people who ran their sprinklers all night?

The MASTER: How is that material.
MR. GUERRY: I want to show that is not a fact. That's how it is material.

Q. Who were they?
A. I can refer to my books and tell you.

Q. Tell me the ones that used them all night?

A. Those who run the sprinklers.

Q. Do you know the names of those who ran the sprinklers all night?

A. I can't give them to you right now. I know this fact; that the tank was full of water at night and the next morning it would be run down. Private consumers would run their works all night.

Q. How long did that drouth last that you are talking about?

A. I only requested the people to shut them off one day.

Q. In reference to the mornings that you speak of and these other times you speak of when you had no pressure, was there a sufficient pressure of water at that time to produce a pressure that would throw water vertically 50 feet, just at those particular times?

A. No, sir.

Q. Wouldn't throw any at all?

A. No, sir. That was discovered very early in the morning when I looked after the pressure.

Q. Along during these years, didn't you and some of the gentlemen here in town make a test—didn't you ask them to go with you and didn't you make a test?

A. I did not.

Q. Didn't you ask Mr. Baldwin?

A. No, sir. Several with me. I made a test but I didn't ask them to go and make a test.

548 Q. When was that?

A. That was—I don't remember what year it was.

Q. Wasn't it '97?

A. I don't remember the year, sir.

Q. It was long before this bill was filed, wasn't it, in '99?

A. I don't remember whether it was before or after.

Q. Wasn't it after the Whitehard fire?

A. No, sir. Sometime.

Q. What do you mean by sometime, several months or several years?

A. Several months in my recollection. I would not be positive.

Q. You furnished right new hose?

A. I had new hose, clean. I think may be I did.

Q. Don't you remember that you did?

A. No, sir; I don't remember.

Q. What was the result of that test?

A. Why, sir, the water went up pretty well.

Q. How high?

A. I suppose, guessing at it, I suppose from 40 to 50 feet.

Q. Don't you know it only went up as high as a telephone pole and not quite as high?

A. No, sir.

Q. Electric light pole?

A. No, sir; I don't know that.
Q. Don't remember about that?
A. I know it went higher.
Q. Don't you remember that it didn't go 50 feet?
A. Inclined to think it went fully 40 or 50 feet.
Q. Don't you know that it didn't go 50, well understood in the presence of a great many that it didn't go 50 feet?
A. No, sir; I don't think any such agreement was made as to that.
Q. Who was present?
A. Mr. Dock Melton and Mr. Baldwin.
Q. Mayor Baldwin?
A. I think so. I don't remember whether he was mayor at that time or not.
Q. A. J. Baldwin?
A. Yes, sir.
Q. A. J. you are talking about?
A. Yes, sir.
549 Q. Don't you remember that at a number of the fires along during that period that this water failed to act—failed to give this pressure and don't you know the water wouldn't run out of the nozzle, it was very thick with mud?
A. No, sir.
Q. Don't you remember anything of that sort?
A. No, sir. I know, sir, on several occasions the pressure was through a long line of hose and was weaker than at other times.
Q. To refresh your recollection: Don't you remember the Green and Whitehard fire was in Jan'y, '97?
A. '97 or '98. I don't remember exactly. I think perhaps it was in '97.
Q. You were never present at any time when there was a failure of pressure—insufficient pressure?
A. I don't say that. I said several times the pressure was lower than it would be at other times, on account of the long line of hose used and the way the hose was managed and condition of the hose.
Q. You remember being at the Baldwin fire, don't you, the lumber kiln?
A. Yes, sir.
Q. When was that?
A. I think that was in '96.
Q. Wasn't there a failure of pressure there that day?
A. I think awhile there was.
Q. How long?
A. Just a few minutes, I think, sir, until the water——
Q. Wasn't the first water that came out of the nozzle almost simply mud?
A. No, sir.
Q. Wasn't it very muddy?
A. It was cleared up.

Q. It wasn't muddy and very thick—didn't flow out a little bit?
A. No, sir; I think that is untrue.
Q. The kiln burned up, didn't it?
A. Yes, sir. Two long lines of hose and the hose leaked very badly when the hose was first attached.
Q. What hose was that?
550 A. When the hose was first attached and the nozzlemen went to the fire, the pressure was weak. After that the water was turned on thoroughly, as I understand it.
Q. That was too late to put out the fire?
A. It was, I suppose, the kiln burned. The department, I suppose didn't turn the water on as they should have done.
Q. Don't you remember that during all that period now, in the summer of '94, and up to the filing of this bill, that there was a complaint among the citizens in the town about the condition of this water and its pressure and the foul condition of it—muddy condition and unfitness for use? Didn't numbers of people tell you about it?
A. Occasionally those kind of sediments would get——
Q. That is not the question I asked you——
A. I want to explain my answer to you, sir.
Q. You answer my question and then explain, it would be more regular: Is it not a fact that during the period I mentioned, numbers of people told you in effect that this water was muddy and unfit for use and smelled badly and the pressure was insufficient?
A. Occassionally they would tell me, for instance on these dead ends and ask me to flush that main so the water would clear up and I would do it.
Q. Didn't they say it was muddy?
A. Yes, sir.
Q. And smelled bad?
A. Once or twice they would tell me about its being muddy—several times about it being muddy and once or twice, I remember, about its being somewhat smelling bad.
Q. During that time don't you remember there was a good deal of talk about insufficiency of pressure when you would have fires—complaints made?
A. Yes, sir; complaints made several times about the pressure.
Q. Wasn't that true as far back as '95?
551 A. I think not. My recollection about the first complaint was made during the Whichard and Green fire.
Q. That was in '97?
A. That's my recollection, yes, sir.
Q. Both of these tanks were open at the top?
A. The first one and the second one, yes, sir, the last one is. First was covered.
Q. I don't understand which was open and which was not?
A. The first tank was covered. Was not open.
Q. The present one is open?

A. Yes, sir. I had a man to come to see me the other — about covering it.

Q. How long has it been there uncovered?

A. Since its erection.

Q. Isn't it a fact that buzzards frequent there and sit on the tank?

A. Yes, sir.

Objected to as irrelevant and being no pleadings to sustain this evidence.

The MASTER: I will let the question stand.

Q. Is it not a fact that buzzards go there and sit and defecate in this water?

A. I don't know about that, sir.

Q. They sit there and roost, don't they?

A. No, sir; I have seen them up there in the day.

Q. Sit there in the day time?

A. Yes, sir.

Q. Haven't you seen signs of their droppings on the sides?

A. No, sir.

Q. Didn't you tell Jack Cameron you had seen these signs?

A. No, sir.

Q. Haven't you seen them fly down into the tank, the buzzards?

A. No, sir.

Q. And out again, as if they were bathing in it?

A. No, sir. Buzzards are not a water bird. Ducks, I suppose they would have went into it.

Q. To refresh your recollection, don't you remember the
552 test that I asked you about was a day or two after the Whitchard and Green fire, which was in June, '97?

A. I don't remember when it was.

Re-direct-examination.

(By Mr. WIMBERLY:)

Q. You spoke of the fire department using the water, was there any change in the use of it after January 1st, '95, from the use of it during the preceding years of '92, '93 and 94?

A. No, sir.

Q. Mr. Guerry asked you about some conversation between you and Mr. Baldwin, mayor, I believe, about January '95, do you remember any fire that happened about January, '95—after the first of January '95?

A. Yes, sir; my recollection is the fire over there at the bakery.

Q. Your records will show the date of that fire?

A. Yes, sir. It was on the 18th or 19th of February, 1895.

Q. In the month of February?

A. Yes, sir.

Q. Do you remember anybody particularly that was at that fire?

A. Why I remember Mr. Hoyl—Mr. Lee Hoyl. I remember he

and I were standing on the bridge on the corner of Third avenue and Main street.

Q. Who else did you see at that fire?

A. I don't remember, Colonel.

Q. Did you see Mr. Baldwin, the mayor, there?

A. I could not say positively whether he was there or not. I only kept a record of the fire, you know.

Q. Not of the persons present?

A. No, sir.

Q. Do you remember at these different fires that you speak of whether members of the council were present at these fires?

A. At various times they were around at fires, is my recollection.

Q. They see the water being used?

A. Yes, sir.

553 Mr. GUERRY: That is not in rebuttal.

The MASTER: If it is not in rebuttal I will exclued it. However, I will let you show that the city officials were present. Confine your redirect to that.

Q. You say you were present at these different fires?

A. Yes, sir.

Q. And that you would see members of the city council present also?

A. Why different members of council would be present. I could not remember——

Q. I mean at the different fires?

A. Yes, sir.

Q. The mayor himself?

A. Yes, sir.

Q. The water that was used, was it used from the hydrants or from the cisterns?

A. Used from the hydrants.

Q. Speaking of the cisterns, there is a provision under the contract—in the contract for filling the cisterns, do you know where the water that would go in the cisterns would come from?

A. Whenever there was 2 or 3 cisterns that had been leaking, I refilled them several times from the works.

Q. Get the water from the waterworks?

A. Yes, sir; 2 or 3 times used the engine in cleaning out the sewers across different streets; and when they would do that the cisterns would be refilled from the works.

Q. From the waterworks?

A. Yes, sir.

Q. From the hydrants?

A. Yes, sir.

Q. You spoke of the volunteer fire department, how many fire companies were there that would turn out to these different fires?

A. Two. One considered to be up town and one down to the Variety works.

Q. Do you know the names of these companies?
A. Protection No. 1 and 2, is my recollection,
Q. In addition to that any colored fire company?
A. Yes.
554 Q. Each of these companies would turn out at fires?
A. The whole business.
Q. Where was the apparatus that they used at the fires kept?
A. Over there in the old engine house that used to stand on this corner here. After the court house was contracted for, they moved it across the street where it now stands.
Q. Who owned the engine house during those years?
A. The city.
Q. For what purpose was the apparatus used at the fires?
A. The hose?

The MASTER: What is that in rebuttal of.
Mr. WIMBERLY: My brother went into it.

Q. During this time, '95, '96, '97, '98 and '99?
A. The hose and general apparatus were used in fires.
Q. Reels?
A. Yes, sir; they carried a reel.
Q. Nozzles?
A. Yes, sir.
Q. Usual equipment?
A. Yes, sir.
Q. Who owned it?
A. The city.
Q. Where was it kept?
A. In the engine house.
Q. The city's engine house?
A. Yes, sir.
Q. Who replenished it from time to time—when more was bought?
A. The city council, I suppose.
Q. State whether or not it was at any time replenished? During this time?
A. Yes, sir; my recollection is that new hose was bought at various times.
Q. During various times between '95 and '99?
A. Yes, sir.
Q. Was there any other place to get water from except this water company—waterworks company?
A. Yes, sir; there was cisterns.
Q. Would it rise up through the hose out of these cisterns?
A. No, sir.
555 Q. To get the water out of the cisterns how would you have to do?
A. Pump it out with the engine.
Q. Did they use the engine at these different fires during that time?

A. No, sir; only 2 or 3 times, I think, they used the engine.

Q. Do you know whether or not after the water works company was erected, during these years, the city continued to employ an engineer to run this engine or ceased that employment?

A. I don't remember about that.

Q. Do you know whether or not they had a regular engineer to handle this engine?

A. Yes, sir; I think just like other volunteer firemen, is my understanding.

Q. How often did you see the engine in use during that time?

A. I remember the engine being brought out twice.

Q. During the 25 fires, or such a matter, that you speak of?

A. Yes, sir.

Q. At the time of these two fires when they used the engine, was the hydrant used too?

A. Yes, sir.

Q. At the other fires where they didn't use the engines, what was used?

A. The hydrants—fire hydrants.

Q. Something was said about the Green and Whitehard fire in the summer, I believe you said you were present at that fire?

A. Yes, sir.

Q. And they asked you about the streams that were thrown there, what was it you said about the hose?

A. There was 600 feet on one line and 550, I think on the other, is my recollection, attached to the same hydrant.

Q. Both attached to the same hydrant?

A. Yes, sir.

Q. Do you know the effect of attaching a long line of hose or more than one line of hose to the same hydrant as to the amount of fire pressure?

A. Yes, sir.

Q. What is the effect?

556 A. It reduces it considerably; then unless the hose is laid straight—unless the line of hose is laid straight, of course that would reduce it.

Q. That old or new hose?

A. A portion of it was old hose. Condemned four sections of it—condemned that day at that fire by R. A. Bishop, who was a fireman at the Variety works.

Q. One of the firemen of the city?

A. Yes, sir.

Q. At the time of the fire?

A. Yes, sir.

Q. Did you see that hose yourself?

A. Yes, sir.

Q. What was the trouble with it?

A. The rubber lining was broken loose from the coupling and the water pressure going in would naturally bend it back.

Q. What would be the effect of that on the pressure or stream?
A. Like clogging a stream.
Q. Doubling back of the rubber retarded the flow of the water?
A. Yes, sir.
Q. Prior to that fire you ever know of any complaints against the pressure?
A. I don't remember, sir.
Q. I believe they asked you something about the lumber kiln and you stated something about the pressure of the water getting stronger afterwards than it was at first, did you make inquiry?
A. Yes, sir.
Q. As representative of the company?
A. Yes, sir.
Q. What did you find?
A. Mr. Fussell——

Objected to and objection overruled.

Q. You did make inquiry?
A. Yes, sir.
Q. Who was Mr. Fussell, you saw him you say?
A. Yes, sir.
Q. Do you know what length of hose was used at the different fires Mr. Guerry asked you about?
A. I could only tell by my record.
Q. Have you got it with you?
A. Yes, sir; I have got it with me, in that chair over there.

Q. You made an affidavit—written affidavit shortly
557 after you made that record, didn't you?

A. Yes, sir.

Q. Refresh your recollection by looking at that and state what the length of hose was that you ascertained from actual measurement? What section is this?
A. This is at the Variety works. This is not the fire down here. There was two long line of hose used down there.
Q. Two long lines?
A. Yes, sir.
Q. You remember the effect there was caused by the two long lines?
A. Yes, sir. One thing that hose down there leaked considerably. I took notice of that.
Q. Leaky hose?.
A. Yes, sir, at every coupling. I have got a record there of these things.
Q. Mr. Horsley, you spoke of the pressure going down on 2 or 3 occasions early in the morning, how long did it remain down?
A. No sooner than I could get my pumps to running.
Q. How often would you examine when you would get up in the mornings to see about the pressure?
A. It was a constant thing during those times. I kept a pressure

gauge at my house and do now. Keep two pressure gauges, one down at the pumping station.

Q. And one in your house?

A. Yes, sir.

Q. You examine them regularly—constantly?

A. Yes, sir.

Q. During the whole of the five years how often did you find any trouble—rather any drop in your pressure—empty—the water had run out?

A. I guess may be 3 or 4 times, something like that. That was during the dry season and only when private consumers would let their sprinklers — all night.

Q. Did it run down by your permission?

A. No, sir; I did all I could to prevent it.

Q. Was it with your knowledge and consent?

A. No, sir.

Q. That is as often as that ever happened?

A. To the best of my recollection, sir.

558 Q. You spoke of one extremely dry season when you asked the people to shut off their sprinklers, do you remember about when that was?

A. It was when they had some meeting at the Methodist church. I don't remember what year it was. It was perhaps in the summer, convention, or something.

Q. What I mean is with that one exceptional occasion—did that ever happen often?

A. No, sir; never happened more than once. My recollection is I never asked them to shut off their sprinklers but one time.

Q. You mean one spell or one day?

A. One day. Don't think it ever happened but one time and that was an extremely dry spell.

Q. Something was asked you about what Mr. Guerry denominated a test, and you stated that Mr. A. J. Baldwin went out with you, was Mr. Baldwin at that time mayor, or did he go out there as a private citizen?

A. I don't remember whether he was mayor at that time or not.

Mr. WIMBERLY: I don't think it will be disputed that he was not mayor at the time.

Q. Had there been any official test requested by the city or any of its officials at the time you went out there?

A. No, sir.

Q. Was Mr. Daws, or any of the people that you worked under, notified or advised of anything of the sort?

A. No, sir. I don't think I ever advised them at all about it, because I paid very little attention to it. Didn't so consider——

Q. Was the height of the stream measured in any way?

A. No, sir.

Q. Any attempt to measure it in feet?

A. I think not, no, sir. Mr. Melton was out there. It was right in front of his gate.

Q. What part of the town is that in?

A. It is in the northeastern part.

559 Q. Was it at the end of a main or centrally located?

A. End of a four inch main.

Q. State whether or not anything like a systematic test—comparison with other plugs, to see whether it was any local cause or obstruction between the two mains, anything of that kind—you made no test of any other hydrants?

A. No, sir.

Q. Try to localize the trouble in any way?

A. No, sir; that's the only hydrant the hose was attached to.

Q. Any effort made to obtain a regular test of the system after that time?

A. No, sir.

Q. Any request for such on the part of the city?

A. No.

Q. Or on the part of anybody?

A. No, sir.

Q. State whether or not there has ever been any request on the part of the city or any official or representative of the city, or any one for any test?

A. ——.

The MASTER: Didn't you ask about that in direct examination?

Mr. WIMBERLY: I believe your honor is correct about that.

Q. You spoke about being requested a few times to flush what you called "dead ends"?

A. Yes, sir.

Q. Where the mud would temporarily accumulate and would always flush it when requested?

A. Yes, sir.

Q. How often did that condition arise and how long would it continue?

A. Sometimes a day perhaps. They would request it once or twice a month probably.

Q. Was it promptly done?

A. Yes, sir.

Q. It removed the trouble?

A. Yes, sir.

Q. I believe something was said about the tank—the present tank being left open, when was the first time that any buzzards sitting up there was brought to your notice or attention?

A. I think sometime last fall.

Q. What did you do?

A. I notified Mr. Daws.

560 Q. Have you taken any steps looking to removing them?

A. Yes, sir; he wrote to me to get estimates on covering the tank.

Q. What has led to the delay—the delay that has resulted?

A. I expected to see Mr. Daws when I got an estimate from Mr. Newberry, also Mr. Geiss. He was figuring with me on it; and I expected to see Mr. Daws in Columbus 2 or 3 weeks ago.

Q. At the time the case was first set you mean?

A. Yes, sir.

Q. And these postponements——

A. Yes, sir; expected to see him and talk to him about it—report the matter to him.

Q. Can you tell us what it would cost in dollars and cents to cover that tank?

A. I have got one man's estimate, $200.

Re-cross-examination:

Q. You remember testifying in the superior court in this case?

A. I think so.

Q. Before Judge Sheffield?

A. I think so.

Q. Don't you remember testifying in substance as follows: Only cisterns were emptied in '95 by testing engine. Witness has cisterns re-filled with water from the waterworks company. Mayor had told witness that the city council was not responsible for any water furnished: Don't you remember you testified to that?

A. I don't remember about that testimony, Colonel.

Q. Don't you remember that is a fact now?

A. No, sir; I don't remember it.

Q. Then again: "The filling of the cisterns was a voluntary act of witness; and after the mayor had stated to witness that the city did not intend using the water any further." Don't you remember you testified to that and isn't that a fact?

A. I don't remember just what I did testify in that case.

561 Q. Then again: "Witness does not know that the city appointed the fire company. Mayor notified witness that the city had abandoned the contract." Don't you remember that?

A. No, sir.

Q. Do you deny that you made those statements in the superior court?

A. No; I say I don't remember them.

Q. In the trial before Judge Sheffield?

A. I don't remember them.

Q. In the case of The Dawson Waterworks Co. against The City of Dawson, before Judge Sheffield. You say you don't remember them?

A. No, sir.

WILLIAM KAIGLER, sworn by the complainant, testified as follows:

(By Mr. WIMBERLY:)

Q. Captain at the time the contract was made in 1890 between R. L. Bennett, his associates and assigns, to organize and charter the Dawson Waterworks Co. in the city of Dawson, what official position did you hold with the city?

A. I was one of the aldermen—city board.

Q. How long had you held the office of alderman? at that time?

A. I think off and on about 10 years. I think part of the time I was mayor two years.

Q. Do you remember the election of 1886?

A. Yes, sir. I was on the council at that time.

Q. Were you a member of the council then?

A. Yes, sir.

Q. During the intervening period that elapsed between July, '86 and Feb'y 1900, you were a member of council—I mean 1890, you were a member of council?

A. Yes, sir.

Q. What was done by the mayor and council?

A. I will go back and make a statement, if I can, and state the whole thing.

562 Q. Well go back and tell it in that way, you are familiar with the history of the whole thing?

A. I think in '82, I think it was, there was a good many fires in the city. We had no water protection whatever. I was on the finance committee and was appointed a committee of one to see what could be done about water. I went forward and built two cisterns. Built one right out here and one in front of the hotel. I saw or council soon found out that would not supply the water—would not protect the city. Then I think they built a few more cisterns a few years afterwards—during that time. Still found out we didn't have enough water. I introduced in council a resolution to put up a wind-mill——

Mr. GUERRY: That is a matter of document.

The MASTER: Your objection is well taken.

WITNESS: To better the waterworks a little. Found out that wouldn't do. Then we went to work to find out what was the best plan to get a waterworks, called an election and took a vote on it.

Q. That is the election of '86?

A. Yes, sir; in '86, I think, sir. ⅞ths of the people of Dawson voted for it.

Q. What did you do toward carrying out the wishes of the people as indicated in that election?

A. We went forward, sir, and made the best trade we could to get up a waterworks.

Q. Did you act hurriedly or did you look around as carefully as you could?

A. Wrote to several companies and tried to get up a waterworks and finally struck up with Bennett.

Q. Between the time that elapsed between the election in the summer of '86 and Feb'y '90, what were you doing, the mayor and council?

A. What were we doing?

Q. What were you doing in the way of trying to get a waterworks?

563 A. We were writing around to see what was the best we could do for the people toward establishing a waterworks. We looked into the matter to see what we could do—to make the best trade we could for the city.

Q. After you looked into it what did you do?

A. Decided to make this contract with Bennett.

Q. Do that under the election you had?

A. Yes, sir; that was after the election.

Objected to and objection sustained.

Q. I believe you said you were a member of council when that contract was made?

A. Yes, sir.

Q. Were you a member the next year, in 1891?

A. I don't recollect what year I went out. There several years after the trade was made.

Q. You were a member when the works were built?

A. No, sir; I was not a member when the works was put in. I was not when it was put in. I think in '91 or '92. May have been off that year.

Q. '91, no dispute about that. Record shows when it was put in, resolution of council accepting them. How long were you in negotiations with Bennett?

A. We were some time, sir.

Q. Were the citizens generally consulted about these matters?

A. They knew what we were doing. Think it was generally known that we were figuring with Bennett to built a waterworks.

Mr. GUERRY: I object to the leading questions and witness' opinion that it was generally known.

The MASTER: Your objection is well taken.

WITNESS: I will state that I am satisfied the citizens knew what was going on.

The MASTER: I rule that out.

564 Q. What did you see—come in contact with in the matter, during the time negotiations were going on with Bennett, what did you then hear and see?

A. About the trade?

Q. About the knowledge of the citizens on the subject?

A. I talked with them—had conversations with a great many.
Q. The citizens of the town?
A. Yes, sir.
Q. The trade that was made, state whether or not it was satisfactory to the people?

Mr. GUERRY: I object to that because it is leading; and I don't think he has got a right to say what was satisfactory to other folks.

WITNESS: I think a great many came to me and talked to me about the waterworks.
Q. Those that came to you how did they stand on it?
A. They were in favor of it.

The MASTER: Is there any allegation in this case but what the public had knowledge of this?
Mr. WIMBERLY: I don't know; the answer is so peculiar, they deny everything they don't admit; and they don't admit anything in the answer hardly. I don't really know how to construe what they do deny and what they do not. No specific denial of it.
The MASTER: If there is no specific denial of an allegation it will be taken as true. The effect of the publicity and knowledge is a question of argument. Is there any issue as to that?
Mr. GUERRY: We say there is quite a number of people here who did not know anything about this contract until it was all over, never found out the terms of it. Of course in a general way the people knew that the waterworks was being built on some sort of a trade with the city; and a great many people no doubt, talked to Capt. Kaigler——
The MASTER: There being a specific allegation and there being no specific denial, if there is any proof to be submitted on
565 that line I will let it come from the defendant.

Q. You lived in the city of Dawson when the works were completed?
A. Yes, sir.
Q. Do you know of any test that was made?
A. Yes, sir.
Q. Were you present?
A. Yes, sir; I was the one that objected to receiving it until we had two tests made.
Q. You objected until two tests were made?
A. Yes, sir; the first test made was not satisfactory.
Q. And had another one?
A. Yes, sir.
Q. That test thoroughly satisfactory then?
A. Yes, sir; everybody was satisfied.

Mr. GUERRY: I object to the statement that everybody was satisfied.

(The MASTER:)

Q. Were you present in your official capacity as an alderman?

A. Yes, sir. In order to satisfy myself, and got him to send a man to the waterworks to shut off the pump.

(The MASTER:)

Q. Then you had a second test?

A. Yes, sir.

(The MASTER:)

Q. That was accepted by the city council as satisfactory?

A. Yes, sir.

Q. What was your objection, the reason you had the test made over again?

A. My objection was I didn't think they came up to the contract. I wanted to be thoroughly satisfied before I received it.

Q. Then they were received after that?

A. Received unanimously by every member of council. Done out here in the presence of a large number of citizens of the city and looked at it. In addition to that some said they didn't think it would throw water up on this hill up there. Went up there and tested it and then came down here and tested it and it throwed water over and above what they agreed to throw it.

Q. After '91, you know whether it has been used by the city?

A. All the time, yes.

566 Q. From then until the present?

A. Up until now.

Q. You have lived in the city all the time?

A. Yes, sir.

Q. You are a tax payer here?

A. Yes, sir.

Q. You have been to these fires yourself?

A. Not all of them. Several of them.

Q. Do you remember any particular fire where you noticed anything about the hose—what happened to the hose?

A. Yes.

Q. What was that?

A. Fire right over here back of Mercer's warehouse, I know the pressure was so strong it tore the hose all to pieces and had to go and get new hose to put out the fire. And I was over here at this late fire at the Farnum house.

Q. What about the Farnum House fire?

A. It throwed water where they wanted it. Stood on the ground and throwed it up on——

Q. That the Baldwin fire?

A. Yes, sir.

The MASTER: There seems to be no issue that since '94, when this contract was renounced or repudiated, the water supplied by

the waterworks company, through these hydrants, has been used at a great number of fires, probably all the fires; and it is only the capacity in which it was used that is in issue. You (complainant) claim that it was by the acquiescence of the city—with the knowledge and acquiescence of the officials; and you (respondent) say if they went and used it, they did so as private citizens, in using the available supply to extinguish the fire. That seems to be the only issue between you as to that. On that issue I will hear evidence on both sides. Beyond that I don't think it is necessary.

Q. Who were present at these different fires?

A. The firemen and a great number of citizens. I think at the Farnum House fire about two thirds of the town.

Q. Was there any difference in the use of the water after
567 January 1st, '95, from what there had been prior to that time?

A. Never seen any, sir.

Q. State whether or not the mayor and aldermen were present? at these different fires?

A. Yes, sir; I saw some of them. I saw the mayor present when it was over here.

Q. What was he doing?

A. Helping around there. I think he had hold of the nozzle awhile.

Q. Used the water in putting out the fire?

A. Yes, sir; used the water from the hydrant.

Q. What water was that they were using?

A. The water from the waterworks.

Q. Fire hydrant water?

A. Yes, sir.

Q. Who owned that building that was on fire at that time?

A. The Farnum house?

Q. Yes?

A. I don't know whether he owned it or his wife. One or the other.

Q. Who do you mean by he?

A. Dr. Farnum. I don't know whether the title is in him or his wife.

Q. At the time you said you saw the mayor using the nozzle, what building was that?

A. I think it was over at that same fire on his building.

Q. Whose building?

A. Baldwin's.

Q. The mayor's building?

A. Yes, gin and grist mill. I saw several more. Mr. Slade had hold of it and several more men. I could name 2 or 3 colored men. Bill Patterson had a nozzle.

Q. Do you know what Bill Patterson's position is?

A. He was there helping them. He belongs to this colored fire department. I don't know whether it is in existence now or not.

Q. Used to be in existence before the paid department?

A. Yes, sir.

568 Q. Do you know anything about these tax exemptions to these members of the fire departments?

A. Yes, sir; all those that belonged to it were exempted from street tax.

Q. By the city?

A. Yes, sir.

Cross-examination.

(By Mr. GUERRY:)

Q. You say you saw A. J. Baldwin holding the nozzle at the fire?

A. Had hold of the hose. I reckon he had hold of the nozzle.

Q. That was when his gin was burning?

A. It originated at the Farnum house—started there.

Q. What was burning at the time he had hold of the nozzle?

A. I think his gin and mill—something around there.

Q. Whose gin?

A. His.

Q. You mean Baldwin?

A. Yes, sir.

Q. What year was that?

A. I don't know that I know. I don't recollect. A few years back. At the time that fire was over there.

Q. Do you remember what year that was?

A. Could not tell you right now what year it was.

Q. Don't you know that Mr. Baldwin wasn't mayor that year or alderman—wasn't any official at all?

A. He has been mayor so long. Might have been Cheatham. Didn't think he was out. One or the other.

Q. What do you say now when you are expressly asked?

A. I don't recollect whether he was or not.

Q. Think about it and see if you can remember?

A. I could not say right now.

Q. Don't you remember what year it was?

A. I think he was mayor. That's my impression or had something to do with council.

Q. You don't say that he was, do you?

569 A. I can't say positively that he was or was not; but my impression was that he was. I can't swear positively.

Q. Now you say on one occasion when the hose bursted—when was that? Baldwin's hose, wasn't it?

A. It was hose around here. They were using it on that fire. I don't know which hose.

Q. Which fire?

A. Little fire back of Mercer's warehouse.
Q. Whose hose were they using?
A. I suppose the city's. The city had charge of it.
Q. You don't know?
A. There with the reel. I supposed the city owned it.
Q. Do you know whose hose it was?
A. I could not swear positively. The city always carried hose to a fire.
Q. You don't know whether it belonged to Mr. Baldwin or the city?
A. I could not say positively. The city had control of it.
Q. That is an inference of yours?
A. No, I judge from the reel carrying them there.
Q. Isn't it a fact that the hose was some old hose that belonged to Baldwin?
A. I don't know. The hose they used bursted. I don't know whether they belong to the city or not. The city furnished the hose.
Q. You say you talked to a good many people about this contract, who did you talk to about it?
A. At the time the waterworks was being built?
Q. Yes?

The MASTER: I think that is inadmissible on either side.

Q. Now the test that was made and pronounced satisfactory what year was that?
A. I don't know, sir.
Q. What kind of test was made before the city accepted the waterworks?
A. Had it up in the council and voted to receive it but myself. I was the only contrary one in it, I reckon.
570 Q. What test was that? Wasn't but one test made, was there?
A. First made a test and I went back and had a second one made.
Q. Wasn't but one that the city acted on?
A. Acted on one; and before I consented to receive it I objected.
Q. Didn't accept it on but one test?
A. Went back and voted unanimously to receive it.
Q. That's the only time they accepted the test?
A. If I had the minutes I could show you that they voted to receive it.

The MASTER: No doubt about the testimony showing that was the test by which the city council accepted it.

Mr. GUERRY: I want to show that there was only one test that it was received on.
WITNESS: That was the last one—the final one.
Q. Was there an election in '82?
A. I think it was in '86, I won't be certain.

Q. Wasn't but one election on the waterworks question?
A. Only one.
Q. That was in '86?
A. I think it was.
Q. When was this contract made?
A. Made a few years afterwards.
Q. 1891, wasn't it?
A. Made it afterwards. I don't recollect what year. Might have been '91.
Q. '90 or '91?
A. Somewhere along there.
Q. Do you remember the first time you ever heard of R. L. Bennett or R. L. Bennett & Co.?
A. First I seen here in town here.
Q. When was that?
A. That was before we made the contract with him.
Q. How long?
A. Little before, 3 or 4 months, time we were hammering——
Q. About that time?
A. Along sometime before we ever made it.
571 Q. You were alderman at that time?
A. Yes, sir.
Q. Were you an alderman in '86?
A. I could not say unless I could get the minutes of council. I was in there once someway, I don't know how.
Q. You had never seen or heard of Bennett until about three months before this contract was made?
A. That's my recollection, sometime before it was made.
Q. How long before it was made?
A. I could not say exactly how long.
Q. About how long?
A. Several months.
Q. Well, at the time of the election of '86, was contract contemplated or being negotiated?
A. When we had the election?
Q. Yes, in '86?
A. It was for waterworks.
Q. With who?
A. Anybody we could get to make it. We wanted to get the people to vote on it then we could go forward and let the contract.
Q. They voted on the question of waterworks or no waterworks and you all went forward during the next several years and finally negotiated this contract with R. L. Bennett & Co.?
A. When that vote was taken it was generally known in the city what it was for, that we wanted to build waterworks in Dawson.
Q. Who wanted to build them?
A. We could not do it without a vote of the people.
Q. Who was to build them?

A. Wanted to get somebody to build them, if we could get anybody to take the contract.

Q. Was there any particular contract in view at that time?

A. I think Dr. Cheatham wrote to several companies North and tried to make contracts with them.

Q. If you will answer my questions it will save us time and trouble: Was there any particular contract in view when you had that election—any particular contract with any particular company or individuals?

572 A. Had several under consideration and accepted Mr. Bennett's.

Q. When the election took place?

A. No, had no particular one at that time. Just casting about to find one.

Q. It is true that you had an election as described and the authorities went forward and finally found a company with whom to make a contract?

A. No, sir; we had it up long before we had the election. Had it up in council.

Q. You don't answer my question, if you will excuse me: You didn't undertake to make any contract until after the election, did you—didn't have any authority?

A. No sir; but we were writing at the same time to see if we could make one.

Q. You went on after the election, finally, about 4 years afterwards and got acquainted with R. L. Bennett or R. L. Bennett & Co. and entered into this contract, that it?

A. Col. Guerry, if I am not mistaken, there was some advertisements put out, won't be certain; and Mr. Bennett may have gotten hold of it and came down here. I won't be certain; but I think letters or something——

Q. The city and the people here, when they voted, they were not contemplating any contract with Bennett & Co.?

A. No particular company.

Q. They were not with Bennett & Co.—never heard of them?

A. Never heard of him until we got an offer from him.

Q. At the time of this election had you ever heard of R. L. Bennett or R. L. Bennett & Co.

A. No, sir.

Q. Don't you know you had not?

A. No, sir.

Q. You say it was a few months before the contract was made that you saw or heard of him?

A. Saw him on business. May have seen him and not known him.

Q. You don't remember?

A. No, sir; not to know him.

Q. You don't have any recollection of knowing him until just before this contract was made?

573 A. I think he was an engineer on the Columbus Southern Rd.

Q. When you did see him first you saw him there?

A. When they were building that road through here. I don't know when that was; but he had something to do with that road.

Q. Several years after this election. Mr. Bennett was a railroad man wasn't he?

A. Might have been. I don't know when the road was built. Have not got the figures before me to tell what year it was built.

Q. I asked you this question: At the time of this election there had been no negotiations or contemplated negotiations with this particular man, R. L. Bennett, or his company?

A. With no particular company. We had been casting about and writing other companies to see who could do it.

Q. It is true every year you had a mayor and council to elect, didn't you?

A. Yes, sir.

Q. Year after year?

A. I think so.

Q. All through those years?

A. Yes, sir.

Q. You said something about introducing a resolution, didn't you?

A. That is my recollection now, sir.

Q. When was that?

A. I could not tell you. Something about a wind-mill tower.

Q. That was after the election?

A. I don't think it was. I won't be certain but I think it was before the election. I won't swear positively.

Q. I will get you to look at that resolution, dated Sep. 6, '86. The election was in June or July. Does a reference to that refresh your recollection. Won't you say your resolution was after that election?

A. If that is true, it was.

Q. What is your recollection?

A. If that is the minutes that is true.

Q. Not asking you that. After refreshing your recollection, get you to state whether or not the resolution you referred to as being introduced by you was after the election or before?

574 A. If that resolution is true it was afterwards.

Q. What do you say?

A. I cannot recollect.

The MASTER:

Q. Is that the resolution that you offered?

A. Yes, sir.

Q. That's the one you referred to?

A. I suppose it is.

The MASTER: The record shows the date of it.

Q. Don't you know that you were trying to carry out that election at the time you introduced that resolution?

A. No sir; to carry out the wishes of the people. The people were clamoring for water; and I thought it was my duty, as a councilman to give it to them.

Q. I will read this to you: "Whereas, the citizens of Dawson have by their vote at an election held, authorized the city council of Dawson to supply the city with waterworks; and whereas, a majority of the city council report adversely, therefore, be it resolved that the city authorities carry out the authorized instructions of said citizens by supplying the city with water from artesian well, either by steam or wind mill, as said council may deem fit and proper without delay. Approved September 6, 1886.

The MASTER: The time is shown by the record. The resolution speaks for itself; and I think it is incompetent for the witness to state.

Q. I understood the witness to state that resolution was before the election. We want to show that it was afterwards by that resolution?

A. I don't think I stated positively that it was before or after.

The MASTER: You have shown that by the resolution. The resolution speaks for itself.

The hearing here adjourned for dinner.

575 Afternoon session.

J. A. CLAY, sworn by the complainant, testified as follows:

(By Mr. WIMBERLY:)

Q. Do you live in Dawson?

A. Yes, sir.

Q. How long have you lived here?

A. Since '85.

Q. Were you at anytime about '93 or after that date, a member of any fire companies here?

A. Yes, sir; I was for some 5 or 6 years from '93 up to, I think '95 or '96—for five or six years, may be to '98 or '99.

Q. What time in '93?

A. I could not say what time we were organized down there.

Q. Were you with them from the time of organization?

A. Yes, sir; went from this company up town.

Q. And your company kept up until about what time?

A. Think we kept up some 5 or 6 years don't know exactly.

Q. You remember the time?

A. No, sir; do not.

Q. Beginning with '98 they organized a fire department here—paid fire department?

A. I know when they started it ours was disbanded up there.
Q. What was the name of your company?
A. Mechanics Fire Company.
Q. There is a little printed book that you let me have at the time you made the affidavit and which is attached to the affidavit which is in Columbus with the record, what is that book?
A. The by-laws you speak of?
Q. Yes?
A. Yes, sir.
Q. By-laws of what company?
A. Mechanics Fire Company.
Q. You operated under those by-laws—in accordance with them?
A. Yes, sir.
Q. From that time state whether or not you kept up your regular organization?
A. We did.
576 Q. The whole time?
A. The whole time.
Q. What did you use in fighting fire?
A. Well, we had a hose reel; our reel room; and then we had—there was an engine and hose reel up here.
Q. Who owned the hose, hose reel—the fire equipment generally that your company used?
A. The city.
Q. The city of Dawson?
A. Yes, sir.
Q. Where were they kept?
A. They were kept down there in a little room built over a cistern at the variety works.
Q. That kept in the street or from the street?
A. Right in the street.
Q. In the public street?
A. In the street, yes, sir.
Q. Who furnished from time to time the necessary equipment for the company to work with as a fire company?
A. The city council.
Q. During '95, '96, '97, up to the time you disbanded about '98, state whether or not you kept up your organization as a fire company?
A. We did.
Q. What did the city do for you during that time in the way of exemptions of any kind?
A. We were exempted from street tax.
Q. During that whole time?
A. Yes, sir; during the whole period we were organized.
Q. During those years, '95, '96 and '97 and up to the time you were replaced by the paid department, what did you do toward fighting fires—turning out at fires?
A. What did we do towards it?

Q. What did you do in that was as a company?
A. We would respond and go about as promptly as we could.
Q. And use this equipment?
A. Yes, sir; carried the hose, *reel and all of our* equipment.
Q. About how many members were there?
A. I don't recollect. I think our limit was 25 but I don't
577 think we had that many.
Q. About how many during the years you speak of?
A. Some 12 or 15 probably.
Q. That many attended regularly?
A. Attended regularly, yes, sir.
Q. At these different fires during those years, what water did you use and where did you get the water?
A. Well, most of it was from the hydrants. Some few times they would use the engine, once or twice. Part of the time it was attached to the hydrants and part of the time from the cisterns.
Q. When you used the engine you used the hydrants also?
A. One time I recollect our using the hydrant and the engine.
Q. Used the hydrants with the engine?
A. Yes, sir.
Q. You mean by hydrants the fire plugs in the streets?
A. Yes, sir.
Q. The waterworks hydrants?
A. The waterworks hydrants.
Q. State whether or not that was done with the knowledge of the mayor and city council here?
A. Yes, sir; it was—guess it was.
Q. They gave you exemptions during those years?
A. Yes.
Q. State whether or not the mayor and council were present when you were using the water?
A. Present at some of the fires.
Q. Do you remember any fire at which the mayor was present?
A. I don't know that I do.
Q. You know any specific fire now?
A. No, I don't recollect that.
Q. State whether or not you held any office in the company yourself?
A. I think I was assistant engineer, probably.
Q. Who was the foreman of your company?
A. Mr. R. A. Bishop was when we disbanded. Think probably we had other foremen during the time——
578 Q. What other fire companies were there besides yours during '95, '96, '97 and '98?
A. There was Protection Fire Co. No. 1 was the whites and Protection No. 2 was the colored.
Q. Did they also attend fires?
A. Yes, sir.
Q. Do you know whether they had the same exemptions?

A. No, sir; I don't know.
Q. You didn't keep up with any except your own list?
A. No, sir.
Q. What water did they use at the fires?
A. They used the same that we did, from the hydrant or the engine. Whatever was in use.
Q. With the exception of one or two times that you spoke of when you used the engine, any water used at any of the fires except from the hydrants?
A. No, sir; none that I seen.
Q. You were where you could see?
A. Yes, sir. Some persons might have had buckets and used them a little.
Q. Would you see them using the hose at a fire?
A. Yes.
Q. Except the engine anything you could use with the hose except the fire plugs?
A. No, sir.
Q. What instructions or notice did your company ever get from the mayor and city council or city authorities to discontinue the use of the waterworks water after January 1st, 1895?
A. If we had any to discontinue it I don't recollect it.
Q. You were never instructed?
A. Not that I recollect of.

Cross-examination.

(By Mr. GUERRY:)

Q. Mr. Clay, do you know anything about the mayor and council adopting a resolution, giving notice to the waterworks company of the abandonment of the contract and wouldn't pay for any more water?
A. I don't know anything about that. I knew they had up a law suit but I didn't know what it was—something about a contract, I thought.
579 Q. You were a member of the fire company how long back—when did you become a member?
A. I think it was in '93, is my recollection.
Q. What sort of implements or apparatus did you have in '93?
A. I think we had a hose reel. I don't know how much hose. Some down there, though, I think.
Q. And an engine?
A. Had an engine. That was up here for this other fire company. Belonged to the other fire company. Still we all used it in a body when we went to fires.
Q. How many cisterns did you have in '93?
A. I could not tell you how many.
Q. Build any more cisterns after '93?
A. I could not tell you when they were built.

Q. Where did they keep this equipment?
A. Kept it over a cistern in front of the variety works in a building.
Q. That was in '93?
A. I think so.
Q. What implements did they have afterwards—you say you joined it in '93?
A. I think it was, yes, sir.
Q. What implements did they have in '95 that they didn't have in '93, do you remember?
A. I don't recollect any.
Q. They just kept the same implements?
A. They added new hose along. Bought some new hose.
Q. When did they do that?
A. At different times. They give us hose during the 5 years may be 2 or 3 times.
Q. It was all kept in the same place as it was in '93?
A. I think so, yes, sir.
Q. And prior to that do you know where it was kept?
A. I suppose it was kept over here in this building.
Q. Same way?
A. I don't know where it was kept.
Q. The engine was used in '94, '95 and '96, along there, was it?
A. Used at some 3 or 4 fires. I don't remember how many.
580 Q. The cisterns of water, they were used too?
A. When we used the engine, yes, sir.
Q. All the companies could use this engine—just mix up in using it when they would have a fire?
A. Yes, sir; when they would have the engine out probably be two streams; and may be one company would have one stream and one the other.
Q. Wouldn't they mix up every which way when they would have these fires and work together?
A. All work together, yes.
Q. The people joined in too, didn't they?
A. Yes, sir.
Q. The other members of the fire company and other people generally, whenever they would have a fire they would go to work and use this water and these implements together?
A. Yes sir.
Q. Didn't matter whether they belonged to the fire company or not?
A. No, sir; not being a member of a fire company would keep them from working. All worked.
Q. Members of council and citizens generally—the people generally, both white and black participated in fire fighting?
A. Yes, sir.
Q. They would use the water, hold the hose, work with the engine and do everything else?

A. Yes, sir; most of the time the engine was used there would be two men, Mr. Deubler and myself.

Q. With the exception of running the engine the people worked indiscriminately?

A. Yes, sir.

Q. Didn't matter whether they belonged to the fire company or not?

A. Yes, sir; everybody worked.

Q. White and black?

A. Yes, sir.

Q. Every time you would have a fire the people would turn out generally and go into fighting the fire?

A. Yes, sir.

581 Re-direct examination.

(By Mr. WIMBERLY:)

Q. You spoke of using the engine on certain occasions, state whether or not, when the engine was used, the fire plugs were also used simultaneously?

A. Yes, sir.

Q. Other streams?

A. Other streams were used when the engine was used also.

Q. What was the engine itself attached to?

A. Sometimes it would be to the cistern and sometimes to the hydrant.

Q. Sometimes to the fire plug?

A. Yes, sir.

Q. Who did you say used the engine when it was used?

A. Mr. Deubler was always the engineer and I assisted him a great deal at the time.

Q. Was Mr. Deubler a member of council?

A. Yes, sir; part of the time. I don't know whether he was the other part of the time or not.

Q. When the engine was used in connection with the fire plugs, by you and Mr. Deubler, when the engine was used in connection with the fire plugs, Mr. Deubler present and assist in the use as well as you?

A. Yes, sir.

Mr. WIMBERLY: We offer in that connection book of by-laws of this company which Mr. Clay testified about. Mechanics Fire Company, No. 1, which is found in the printed Record on pages 178, 179, 180 and 181, the original being attached to his affidavit.

Mr. WIMBERLY: Might be more proper in rebuttal, as to there being a regularly organized fire department kept up here, which kept up by-laws, etc.

Objected to as immaterial, irrelevant, and inadmissible.

The MASTER: I can see that it is material and relevant to
582 show that there was an organized fire department; and to show that they maintained an organization; but wherein are the by-laws themselves admissible or material?

Mr. WIMBERLY: I put them in in order to show that it is the highest evidence that there were by-laws.

The MASTER: The testimony that they maintained an organization under by-laws is admissible; but unless there is something material or relevant in a particular by-law, I hardly think the bylaws need go in the record.

Mr. WIMBERLY: I suppose that will answer every purpose, the fact that they did have by-laws. I understand the book goes in to show that fact?

The MASTER: The testimony of the witness is sufficient on that point.

B. H. OZIER, sworn by the complainant, testified as follows:

(By Mr. WIMBERLY:)

Q. During what time were you connected or a member of the Mechanics Fire Company No. 2, of Dawson?

A. I was a member of it from the time it was first organized until it disbanded.

Q. Do you remember the time it disbanded?

A. I think it was about '97 or '98.

Q. Could you refresh your recollection from an affidavit that you made when it was fresh in your recollection, distinctly as to when it was disbanded?

A. I don't know whether I can or not.

Q. Can you remember the date of its being disbanded by another fact, the fact of an organized paid fire department here, when were you disbanded relatively to the time that was organized?

A. It was about 1898.

583 Q. Before or after that?

A. I don't know, sir, exactly.

Q. Shortly afterwards, I mean?

A. Yes, sir; shortly afterwards.

Q. Now up to that time, shortly before the paid fire department was organized, prior to that time, during '95, '96 and '97, were you a member?

A. Yes, sir.

Q. What office did you hold?

A. A. Well, when the company was first organized I was elected foreman then.

Q. After that?

A. After that I was plugsman and secretary and treasurer, after that.

Q. At the time you were disbanded what office did you hold?

A. I was secretary and treasurer.
Q. Did you keep the minutes?
A. Yes, sir.
Q. Where is your book of minutes?
A. It was turned over to the fire department—no, turned over to the city council.
Q. What time did they send for it and get it?
A. After we disbanded.
Q. After the beginning of '98?
A. Yes, sir.
Q. Have you had it since?
A. No, sir; have not seen the book since.
Q. Minutes were kept up until that date?
A. Yes, sir.
Q. Who kept the minutes?
A. I kept the minutes.
Q. What I mean by keeping them, who wrote them up?
A. I did.
Q. Wrote them in the book?
A. I did.
Q. What did the company do in the way of keeping its organization up?
A. We met regularly every meeting night.
Q. Kept your officers up?
A. Yes, sir.
Q. Have any roll?
A. Yes, sir.
Q. Did you call it?
A. Yes, sir.
Q. Do you remember how many were on your roll, you were the secretary?
A. Something about 15 were the usual members.
584 Q. What did you do when there was a fire?
A. Went to the fire as fast as we could.
Q. Your company?
A. Yes, sir.
Q. Keep up its organization at fires?
A. Yes, sir.
Q. During the years '95, '96 and '97 did you attend the different fires?
A. Yes, sir.
Q. Well, what you did those years compare with what you did in '94 and previous years?
A. Every time there was a fire and we could hear it we would go to it.
Q. What did you do at the fire?
A. When we were first organized we didn't have any hose reel. Shortly afterwards the city council furnished us with a hose reel and set of spanners.

Q. Did they keep you supplied during the whole time until you disbanded in '98?

A. Yes, sir; kept them down at the variety works.

Q. When you needed a new supply they kept you supplied?

A. I expect we needed some better than the ones we had but we made out with the ones we did have.

Q. At the fire where did you get your water?

A. Got it from the plugs—hydrants, I mean.

Q. Waterworks water?

A. Yes, sir.

Q. What notification did you ever have to discontinue the use of that water?

A. I don't know that we ever had any that I know of.

Q. Were you the secretary?

A. Yes, sir; when we disorganized, Mr. Bob Bishop, he was the foreman at the time, he said the city council said reckon we would have to disband, they were going to have a paid fire department?

Q. That was about '98?

A. Yes, sir.

Q. Up to that time you never had any notice to discontinue the use of the water?

A. No, sir.

585 Q. Was there any different water from what you had been using?

A. No, sir.

Q. What privileges, if any, did the city give you—any exemptions of any kind?

A. From street tax.

Mr. GUERRY: Just persistent leading of the witness.

Q. What years did you have these tax exemptions?

A. All the time we were belonging to the fire company.

Q. Who had these exemptions?

A. Members that belonged to the fire company. Mechanics Fire Co. too.

Q. Who kept the list or roll of these exemptions, the members they were given to?

A. Well, just before we disbanded I kept them myself.

Q. The last part of the time—prior to that time who kept them, do you remember who you succeeded?

A. Several others.

Q. Different persons alternated?

A. Yes, sir.

Q. At these fires you attended, state whether or not the city council knew what water you were using?

A. Yes, sir; they were obliged to know what water we were using.

Objected to——

Q. State your reason for your answer—who was present?

A. Got it from the hydrants like the company did up here. The colored company did too.

Q. Who would be present when you were using the water?

A. I reckon about as many people in our town who could get to the fire.

Q. I mean any member of the city officials, the mayor or councilmen?

A. I know Mr. Deubler was there all the time and Mr. Baldwin.

Q. Mayor Baldwin?

A. Mr. Baldwin.

Q. A. J. Baldwin?

A. A. J. Baldwin, yes sir.

Q. Mr. Dean—Dr. Dean?

A. I don't recollect much about Dr. Dean.

586 Q. Do you remember Mr. Melton?

A. While we were there I don't remember looking around to see who was there then. We were fighting fire all we could.

Cross-examination.

(By Mr. GUERRY:)

Q. When did you say the paid department was organized, what date?

A. It was something along about '98.

Q. Wasn't it '99?

A. Commenced about that time. I could not tell you positively about the time.

Q. That is the same year that the disbandonment of the old one took place, was it?

A. About that time.

Q. When you went to those fires the people generally went to work and mixed up with each other fighting fire?

A. Yes, sir.

Q. Indiscriminately?

A. Yes, sir; seemed like everybody would take a hand in it.

Q. People that didn't belong to the company pitched in like yourself?

A. A good many of them would pitch in and do what they could, yes, sir.

Q. Take hold of the nozzle?

A. No, sir; didn't take hold of the nozzle.

Q. None of them?

A. If they did——

Q. They helped with the hose?

A. Might have helped pull the hose around and get them straight. Never took hold of the nozzle.

Q. The nozzle is generally held by a member of the company?

A. Yes, sir; members of the company elected to use the nozzle.

Q. When it came to assisting, the people participated generally and didn't matter whether they were private citizens of officers, white or black folks?

A. Yes, sir.

587 Q. It was indiscriminate, they went to fighting fire?

A. All helped that could.

Q. All helped when you were using the waterworks water like they did when you were using the cisterns?

A. Yes, sir.

Q. What year was it that you saw Baldwin present at the fires?

A. I could not tell you exactly what year. He would be there all the time. Main man in the fire department.

Q. Whenever there was a fire he and numbers of other people would always be present—people right here in town?

A. Yes, sir.

Q. Can you name any fires at which he was present and the year?

A. I don't know as I can. Don't think he would——

Q. You remember about him like you do a number of other people, generally on hand, were they?

A. Yes, sir. Mr. Baldwin was president of the fire department.

Q. When?

A. He was president of the fire department, if I am not mistaken, when this company was organized.

Q. When was that?

A. That was about '92 or '93.

Q. Do you recollect the date it was organized?

A. No, sir; I do not.

Q. How long have you been living here?

A. I have been here 16 years.

Q. How far back does your connection with the fire department extend?

A. Never belonged to the fire department until I joined this one.

Q. In '98?

A. About '93, I reckon, when we first organized.

Q. I am asking you about the date of the organization of the paid fire department under the resolution—when it was actually organized, wasn't it in '99?

A. I could not tell you. I don't remember anything about that.

Q. Don't remember whether it was in '98 or '99: Wasn't

588 it after this bill was filed—this injunction granted in this case?

A. I could not tell you.

Re-direct examination.

(By Mr. WIMBERLY:)

Q. You stated that there was a member of the fire company appointed or elected for the purpose—appointed a nozzleman, what else was any other member of the fire company elected to do?

A. All of them were appointed to certain duties.

Q. Can you mention some of the other duties that some of the members of the company did?

A. Some was to take the hose off the hose reel, help pull the hose and such like.

Q. What about the plugs?

A. Some was to—well, I was one of the plugmen myself.

Q. What was a plugman?

A. Stay at the plug and turn on or cut off the water.

Q. Was that done by regular members of the fire department or anybody indiscriminately?

A. Regular members of the fire department.

Q. Appointed for the purpose?

A. Yes, sir.

Q. During all these years you speak of?

A. Yes, sir.

WILLIAM PATTERSON, (col.), sworn for the complainant, testified as follows:

(By Mr. WIMBERLY:)

Q. You remember the time—how long have you lived in Dawson?

A. Thirty-five years.

Q. Do you live here now?

A. Yes, sir.

Q. Did they ever have a colored fire department here?

A. Yes, sir; had a colored company.

Q. It was part of the department, the company, was it?

A. Yes, sir.

589 Q. Who was the foreman of that colored company?

A. I was foreman bigger portion of the time.

Q. Up to what time did that colored company keep up its organization—its work of fighting fires here in Dawson?

A. Up until '98.

Q. During '95, '96 and '97?

A. Yes, sir.

Q. And part of '98, was it?

A. Yes, sir.

Q. Who was their foreman during those years, '95, '96 *a* '97 and up to the time you speak of in '98?

A. I was foreman '95, '96, '97 and '98.

Q. How many members of your company was there?
A. In '94 we had fifty; and the county complained about it and they cut us down to 30—25.
Q. What do you mean by complaining about it?
A. Most too many men being exempted from paying street tax.
Q. Too many for working the streets?
A. Yes, sir.
Q. What time was that now?
A. In '94 and '95 we had 50.
Q. Then in '96 and '97 how many did you have?
A. Stood from about 25 to 30.
Q. They got street exemptions?
A. Yes, sir.
Q. Who gave those exemptions?
A. The city marshal.
Q. Well, what was the name of your company?
A. Protection No. 2.
Q. Did you have any book of by-laws?
A. We had a little code of laws that we got from the council.
Q. Would you know one if you were to see it?
A. That's one. (Referring to book in hand of Mr. Wimberly.)
Q. Did you keep up your organization?
A. Yes, sir.
Q. What did you do?
A. Met once a month promptly and turned out at all fires promptly.
Q. What did you do at the fires?
A. We responded under the supervision of the chief.
590 Q. Who was chief during that time?
A. I think Deubler. He had more to do with it than anybody else. He was general boss.
Q. Did Mr. Baldwin go to the different fires, Mayor Baldwin?
A. Yes, sir; he has been to most every fire I ever seed.
Q. What did he do at the fires?
A. He takes an active part like all the rest.
Q. During '95, '96 and '97?
A. Yes, sir.
Q. Where did you get your water during that time that you fought your fires with?
A. Got it from the hydrants and cisterns, in one or two instances.
Q. When you got it from the cistern what did you use?
A. Used the engine when we got it from the cisterns.
Q. When you got the water from the cisterns in one or two instances when you used the engine, did you use the hydrant too?
A. Yes, sir.

Objected to as leading and objection sustained.

Q. Take the fires during '95, '96, '97 and '98, how many of those fires were you at?

A. I think I was at most all of them, except one or two.
Q. At every fire you attended, what water did you use?
A. Used the hydrants.
Q. Was there any fire during that time at which you didn't use the hydrant?

Objected to as leading and objection sustained.

WITNESS: No, sir; I don't think there was.
Q. What did you use—what apparatus did you use?
A. We used the hose reel, nozzle and spanners.
Q. Who did they belong to?
A. The city council.
Q. Where were they kept?
A. Over at the engine room.
Q. Who owned the engine room?
A. The city council.
591 Q. Where is the engine room?
A. Right over there on the east corner.
Q. Is it used now?
A. Yes, sir.
Q. By who?
A. The council.
Q. For what?
A. To keep fire reels, hose and all like that in—the engine.
Q. Who uses the engine, hose and all now?
A. The paid department.
Q. What water do they use now?
A. Use the hydrants.
Q. State whether or not there has ever been any time since January 1st, 1895, at which the hydrant water was not used?

Objected to as leading and objection sustained.

Q. During the time that has elapsed since January 1, '95, have they used the hydrant water in fighting fires?
A. Every fire I have been to since '95 they have used the hydrants.
Q. Who, if any one, connected with the city ever forbid you using the water to fight fires?
A. No one.

Cross-examination.

(By Mr. GUERRY:)

Q. When they had fires during all this time the people generally helped put out the fire, didn't they?
A. Yes, sir; sometimes they would.
Q. Didn't they generally do it?
A. Didn't all the people, you say?

Q. Didn't all the people go and help about the fires if you had anything like a considerable fire?

A. No, sir; all of them didn't work.

Q. I didn't ask you if all of them. Didn't people besides yourself —I will put it in that way—those who didn't belong to the fire department, didn't they help too?

A. Yes, sir; some would help sometimes.

592 Q. What would they do?

A. Help us move the hose around and help us bring a ladder around, sometimes go on top of the houses—anything they could do.

Q. Helped you about the hose you say?

A. Helped us move them around, yes, sir.

Q. They would help just like the firemen would, wouldn't they?

A. Yes, sir; they would help like some of the firemen. Some had different positions.

Q. What sort of an engine did you have?

A. Engine? Didn't have any engine at all. We had a reel.

Q. Didn't you have the "Joe Brown"?

A. Had the "Joe Brown" about '75, '76 and '78, along there. That old chemical engine.

Q. '75?

A. Yes, sir; way back in '75.

Q. To refresh your recollection about the dates—you mean over a quarter of a century ago?

A. No, I mean in 1875.

Q. 27 years ago, or 1895?

A. No, sir; I don't mean 1895.

Q. 1885?

A. No, sir; I mean '75, what I said.

Q. You are certain about the date, are you?

A. Yes, sir.

Q. You have been connected with the fire department ever since then, have you?

A. I joined in 1873.

Q. Been in it ever since?

A. Yes, sir; until '98.

Q. I mean up to that time?

A. Yes, sir.

Q. At the time you disbanded?

A. Yes, sir.

Q. What apparatus did the city have in 1890?

A. Well, they had a steam engine.

Q. Which?

A. Steam engine.

Q. A steam engine?

A. Yes, sir.

Q. What else, did they have any hose?

A. Yes, sir.

Q. Hose reel?

A. Yes, sir; they had a hose reel, the "W. B. Cheatham."

Q. They had cisterns then, didn't they?

593 A. Had five cisterns, I dug them.

Q. Before the waterworks was built, where did they get the water to fill the cisterns with?

A. Well, they got it in different ways. The waste water out of the pump yonder filled the first cistern.

Q. And caught it off the house tops, didn't they?

A. Filled the first cistern and then extended a pipe from the first one—when the first one got full, it would run in the other one.

Q. You are talking about before the waterworks was built?

A. Yes, sir.

Q. What apparatus did they have after they built the waterworks that they didn't have before, the city?

A. They got 800 feet of hose.

Q. You had hose before, didn't you?

A. Had some hose before, yes, sir.

Q. Just got some more hose?

A. Yes, sir.

Q. You had reels before?

A. Yes, sir.

Q. You had an engine?

A. Yes, sir.

Q. After the waterworks was established you still had the engine hose and reel?

A. Yes, sir.

Q. What else did the city get besides the hose reel and engine after they got waterworks, in the way of implements and apparatus?

A. They got a lot of ladders.

Q. Did you have any ladders before that?

A. Yes, sir; had old extension ladders; but they got better ladders. Got better ladders, 800 feet of hose and spanners.

Q. You needed the hose when you used the cisterns, didn't you, more, really, then when you used the plugs, ain't that a fact?

A. That is sorter hard for me to answer, what they needed. I can tell you what they had. Didn't have as many——

Q. You did have hose after you got some new hose?

594 A. Yes, sir; got some more new hose—better hose and more.

Q. Do you remember swearing in this case in the superior court before Judge Sheffield, in the waterworks case against the city?

A. I disremember whether I was sworn up here or not. I don't believe I was though.

Q. You remember that you swore that you were the colored chief—chief of the colored fire company during the year '95; and they were furnished with a hose reel and engine by the city, which was kept in the same engine house as the white company. Do you remember that?

A. I remember everything but one thing.
Q. What is that?
A. That is the engine. The niggers never did have charge of any engine.
Q. You say you didn't swear to this then?
A. I swore we had hose and hose reel and spanners, etc.
Q. Didn't you swear that you were furnished by the city with an engine, and wasn't it the "Joe Brown" engine or chemical engine?
A. No, sir; we ain't used the "Joe Brown" engine.
Q. You didn't swear that on that trial?
A. No, sir; I might have said they furnished that but not to us.
Q. Who did you mean they furnished it to then?
A. The fire company.
Q. Didn't you say they furnished it, referring to your company, of which you were chief?
A. I don't think I said "they."

The MASTER: If you have the stenographic report I think it would be somewhat fairer to the witness.

Q. You remember when you wanted to go to Macon in '95, you saw the mayor, Mr. Baldwin, about going and about using the water for practicing before you went?
A. Yes, sir.
Q. And don't you remember that Mr. Baldwin told you that you would have to see Mr. Horseley, he was not using the water, had discontinued the use of it by the city?

595 A. I will tell you what I said to Mr. Baldwin: They were going to have a tournament in Macon and our company wanted to go—the colored company. I went and saw Mr. Baldwin and asked him about the water. He told me that he had nothing to do with the water, couldn't give me any authority to use the water to go to Mr. Horsley. We went to Mr. Horsley, also to Mr. Deubler and they told us to use the water; and we practiced every evening for 60 days before we went to Macon.
Q. How many days?
A. Except Saturday evenings.

Mr. WIMBERLY: I object to that as irrelevant and ask to rule it out; because under the original contract they had no right to use the water for practicing, only allowed them to use it in case of a fire; and if they had asked him that in '91 or '92, the mayor would have told him the same thing. Therefore, I think the testimony is irrelevant.

Q. Didn't he tell you he had nothing to do with the water?
A. He told me he could not give me any permission to use that water, to see Mr. Horsley.
Q. Didn't he tell you that he had nothing to do with the water at all, the city had quit using the water?
A. No, sir; he never told me that.

Q. At the same time I asked you about just now, about asking the mayor, didn't you ask the mayor for permission to sprinkle the streets in '95; and didn't the mayor say: "Bill, I haven't any right to give you orders at all, you will have to see Mr. J. A. Horsley?" and said he had a steam engine and hose?

A. He said that to me.

Re-direct examination.

(By Mr. WIMBERLY:)

Q. How many people would it take to use the steam engine?

596 A. Well, I reckon it took 15 men to handle it mighty well.

Q. It took all three companies?

A. Sometimes all of us would be around it. All of us would not be at work.

Q. When some would be using the engine what would the balance be doing?

A. The colored people would be mostly at the plugs.

Q. What is that?

A. We would be at the hydrants.

Q. You spoke of having to buy 800 feet of new hose after the waterworks were built, how many feet in a section?

A. 50. feet.

Q. That would be 16 sections of hose?

A. Yes, sir.

Q. That's what your company had?

A. Didn't have it exclusively as ours. All ours. Whole company had them.

Q. You mean the whole company? What company?

A. The white folks—two white companies and one colored company.

Q. Where did you keep the 800 feet?

A. Kept over there.

Q. That in addition to what they kept down yonder near the Variety works?

A. Some old hose down there and we had some old hose up here.

Q. What about the new hose, where did they keep them?

A. In the engine house.

Q. The other new hose down there, you know about them?

A. No, sir; I don't know what they had down there.

Q. You spoke about what they had up here?

A. Yes, sir; had reel over there.

Q. During '95, '96 and '97, did they buy more hose?

A. I think it was in '95 they bought new hose.

Q. '95?

A. I think it was.

Q. What else did they buy in '96, '97 and '95?

Objected to as not being in rebuttal.

WITNESS: Really don't know what else they did buy. I know we would have new hose and council would give us new hose to use.

597 Q. All during that time whenever you needed anything new, they would give you something new?

A. Yes, sir; what we wanted.

Re-cross examination.

(By Mr. GUERRY:)

Q. What was bought in '95—do you remember distinctly that anything was bought during the year '95?

A. In '95 I think Mr. Deubler bought—at least ordered 800 feet new hose.

Q. The purchase of the new hose by Deubler is the purchase you referred to?

A. Several other new things. Everything we wanted new.

Q. What was bought in '95 besides the hose?

A. I don't know, sir, everything that was bought.

Q. State what was bought in '95?

A. Bought us some new ladders. I don't know whether it was in '95 or not. I think it was '96 or '97. Didn't buy the ladders when they bought the hose. Bought them later on.

Mr. WIMBERLY: We ask to offer a transcript of the suit referred to in paragraph 11, page 8, of the bill, in Terrell superior court. While you don't deny it, you don't very clearly admit it.

Objected to as irrelevant.

Mr. WIMBERLY: It sheds light on the question of good faith in the repudiation. The allegation is that while they were trying to buy the works from us, they not only repudiated, but went through the form of having the tax payers bring a bill to enjoin the payment of money. The bill was prepared at the instance of the city council and by their salaried attorney, to enjoin themselves.

The MASTER: I don't consider there is any issue raised on
598 that. I shall rule that where there is a distinct allegation of fact, which the answer does not deny, in the bill, it will be taken as true.

Mr. WIMBERLY: We offer the tax assessments for the city of Dawson for the different years from 1890 to 1898, on page 121 of the printed record and the certificate on page 122.

Objected to as irrelevant.

The MASTER: For what purpose do you want to put this in?

Mr. WIMBERLY: One paragraph of the bill sets forth the pledge of the city to raise by taxation the rentals. There is a paragraph in the contract which says that they will raise it by taxation. That shows their pledge.

Mr. GUERRY: If that is the purpose in putting it in I shall object to it as being totally irrelevant.

The MASTER: I hardly think it is relevant for that purpose. There is no issue in this case——

Mr. WIMBERLY: You don't deny the fact that you are endeavoring to collect the taxes for these years that we allege?

Mr. GUERRY: I don't remember the allegations. Like very much to have them. We claim they are due and unpaid. That is my recollection. I don't think there is any trouble with the pleadings regarding any proof.

J. A. HORSLEY, recalled by the complainant, testified as follows:

(By Mr. WIMBERLY:)

Q. The two pipe fountains on the streets of Dawson, the property of the city, do you know whether the waterworks company
599 ever furnished water for those fountains described in the waterworks contract?

A. Yes, sir.

Q. Did they furnish water to the municipal buildings—offer to furnish that?

A. Yes, sir. When they bought the old court house and moved it out there, I notified some of the members of council that we would furnish them with water whenever they saw fit to put in their pipes, and things.

Q. Are you now furnishing water to any municipal buildings?

A. Yes, sir.

Q. Under that provision of the contract?

A. Yes, sir.

Q. Make any charge for that?

A. No, sir; no charge.

Cross-examination.

(By Mr. GUERRY:)

Q. You say you are furnishing water to a municipal building?

A. Yes, sir.

Q. Where?

A. Down at the fire department.

Q. Down at the fire department?

A. Yes, sir.

Q. What other building are you furnishing it to?

A. That's the only one now, sir.

Q. Were you under the original contract to furnish that building—that place?

Mr. WIMBERLY: That is a question in the contract.

Q. Are you furnishing that under the original contract?

A. Yes, sir. They came to me when they fitted that up for the fire department, they came to me—I believe Mr. Deubler came to me and asked me what the charges would be down there for their horses to use the water and for the firemen, things of that kind, and I remarked to him, "Well I says, under our contract, there would be no charge." That's my reply to him.

Q. Where else are you furnishing any for the municipal authorities, officers, and so on?

A. Got no other openings fixed in any of their buildings.

Q. How long has that been true?

A. Which?

600 Q. That they have had no openings for you to furnish?

A. I don't remember, Colonel, used since these fountains, I know.

Q. When was that?

A. That was several years ago. I don't remember just what year. A wagon run away one day and knocked one of them up over there.

Q. Have the city authorities used any water under this contract since '95? If so, where?

A. The city authorities?

Q. Yes.

A. I consider that down there, sir.

Q. Any other place besides that?

A. None that I know of.

Q. When did they commence using that down there?

A. When they first put in the system down there.

Q. When was that?

A. I suppose about '98 or '99.

Q. Was it since the granting of this injunction?

A. I don't remember about that.

Q. Don't you know it was in '99, since this suit started?

A. At the time they put in the paid department.

Q. When was that?

A. I don't remember what year it was.

Q. Was it '99?

A. I tell you I don't remember.

Q. You don't remember whether it was before the injunction was granted or since?

A. No.

Q. What was that service down there worth—what was the value of it?

A. I don't know, sir.

Objected to as irrelevant and objection sustained.

Q. Mr. Horsley, you remember this chemical engine that you testified about, the city had a chemical engine and some cisterns as well as a steam engine, you remember about that engine?

A. The chemical engine?

Q. Yes?

A. Yes, sir.
Q. Didn't these colored people have it in '96 when you testified?
A. I don't remember what years they had it.
Q. Didn't they have it in '96?
A. I don't remember about that.
601 Q. Didn't they have it in '95?
A. I don't remember about that.
Q. Have it in '97?
A. I don't know sir, I can't remember the dates they had it.
Q. It was at the time you testified on the trial of this case that they had it, wasn't it?
A. Whether they had it then or not, I don't remember.
Q. Didn't they have it at that particular time when you testified in '96—didn't they have it at that time?
A. Did I testify they had it at that time?
Q. What is your recollection about your testifying about them having it?
A. I don't remember about testifying.
Q. Do you remember when they had it?
A. Had it for several years; but I don't remember what year.
Q. How long has it been since they had it?
A. I could not tell you.
Q. Five or six years?
A. I don't know; may be in the city now, I don't know. I have not had anything to do with the fire department for several years.
Q. Didn't they have it 5 or 6 or 7 years ago?
A. I don't remember.
Q. Six years ago?
A. I don't remember whether they had it or not.
Q. When did they get the steam engine?
A. I can't remember that now. I guess it has been 15 or 16 years ago.
Q. Didn't they have this chemical engine during the last 8 years?
A. The last eight years?
Q. Yes?
A. I don't know, sir.
Q. Last ten years?
A. I don't remember just when they done away with it, if they have done away with it.
Q. You can't give any idea whether it was during the present century or not—present quarter of a century or not?
602 A. They have had it, I guess, in the last few years. The exact year I don't remember.

Re-direct examination.

(By Mr. Wimberly:)

Q. You speak of this fountain, can you fix the date when that was broken up with reference to anything that has transpired—any trial, anything of that sort?

A. No, sir; I cannot.

Q. What did you do after that city's fountain was broken down?

A. I shut the water off. It was wasting in the street. The pipe was torn up.

Q. Did you see any of the city authorities after it was turned out?

A. Yes, sir; saw them all along.

Q. I mean with reference to that fountain?

A. My recollection is that I told them whenever they repaired it, of course the water would be turned back in it. My recollection is that I told some of them that I shut the water off until the pipes or the fountain was repaired. That is my recollection about it, since thinking.

Q. State whether or not they have used the chemical engine since the waterworks was established?

A. If they have I don't remember it.

Re-cross-examination.

(By Mr. GUERRY:)

Q. Didn't you say to Dr. Dean, while this suit of The Dawson Waterworks Co. *vs.* The City was pending, that it would be carried into the United States court upon a failure of the State courts?

A. No, sir; that was not the language.

Q. What was the language?

A. I remember something about Dr. Dean kinder joking me one day, running on about the case, and I made about this remark: "Oh well, if we can't get justice in our State, may be we will go where we could get it," something to that amount. It was all in a joke.

603 Q. Didn't you say the United States court?

A. No, sir; I don't think I did. Think that is the remark that I made.

Q. What other court did you refer to?

A. If I referred to any particular court it was the Federal court.

The MASTER: I don't think this testimony is very relevant; but I will let it stay in the record for the moment.

Q. (By Mr. WIMBERLY:)

Q. In making that remark, did you have any authority from the people that controlled the waterworks company to make it?

A. None whatever. Dr. Dean was kinder joking me about the waterworks case, like a good many of them did—like several did, and under the impulse of the moment I made that reply.

Q. Had you any conference with anybody who could control the litigation when you made that remark?

A. No, sir. Wholly my own remark in reply to Dr. Dean.

J. G. PARKS, sworn by the complainant, testified as follows:

(By Mr. WIMBERLY:)

Q. Are you in the fire insurance business?

A. Yes, sir; I have a fire insurance agency. I am connected with one and have been since 1876. Mr. R. E. Bell has charge of the office, the young man just gone out. I had him here but he has gone out of the room. I know the facts as to the rates of insurance in the town and have known them for over 25 years.

Q. Do you know what change resulted from the construction of the waterworks here?

Objected to as irrelevant.

Mr. WIMBERLY: Shows the advantage of the waterworks system to the town. I propose to follow it up by showing that the town has all the time continued to enjoy the same rates, on the basis of their having this waterworks system for fire protection; and how much it amounts to.

604 The MASTER: In view of the further examination I will admit it.

WITNESS: The rates were revised soon after the water works system was put in. I tried to find that rate but the young man has been unable to lay his hand on it. I find rate sheet made in '97, February 11, 1897. The town was rated at that time on the basis of having a fire department consisting of one No. 4 Silsbury steamer; one combined chemical engine, hook and ladder truck; 1600 feet of hose; two hose reels, a volunteer department of 70 members; and this apparatus in good condition. The water supply of the town, on which the rates were promulgated, was waters derived from springs which furnished an adequate supply of water at all times; tower wooden, 60 ft., frame base, pumping station—I don't know that it is necessary to give all that. The rates was based on the idea that the town had an efficient fire department, cisterns, and a volunteer department of 70 members——

Objected to as irrelevant.

The MASTER: Unless you connect that with some representation of the city officials, I will rule it out.

Mr. WIMBERLY: We propose to show that prior to the erection of the water works the town was a 4th class risk instead of a third class; and the rates were 25 per cent. higher. I state frankly at this time we are not prepared to show any representations by the city council.

The MASTER: The testimony is undisputed in this case that they continued to use this water in case of fire. Now this is only to the effect that the insurance company recognized no discontinuance. I don't see how their attitude in the matter can affect this case, unless it is connected with some representation on the part of the city.

MR. WIMBERLY: I cannot at this time connect it.

605 THE MASTER: Then I hardly think it is relevant.

MR. GUERRY: I understand that is ruled out?

THE MASTER: Yes, sir. I have admitted none of this witness' testimony in chief. If the other side cares to put him up in chief, they can do so.

MR. GUERRY: I want to ask him some questions as their witness.

THE MASTER: He has not testified to anything as their witness. I ruled that out.

MR. WIMBERLY: We will ask permission to introduce Mr. Bishop when he comes in.

THE MASTER: He was a member of the company no member of which has testified so far.

MR. WIMBERLY: I think he was a member of the same one as Mr. Ozier; but he was foreman of the company.

THE MASTER: You can reserve the right to offer him as if he was offered before you closed.

MR. WIMBERLY: In addition we will have certain depositions of Philadelphia witnesses that are on the line mainly mapped out; and in connection with that we will tender certain minutes, entries and statements from books, and so on, that we could not put in until we took their depositions. Of course we will need their depositions to prove it, like the contract between the American Pipe Mfg. Co. and the Dawson Waterworks Co., etc.

THE MASTER: Well, sir, you can reserve that right.

Plaintiff then closed.

MR. GUERRY: When we get through with what evidence
606 we have now, we will not finally close either. We would not be required to do that until the complainant closed.

THE MASTER: When you finish your testimony now, you may make such reservations as are proper. Of course any testimony introduced by the complainant, you have the right to answer or rebut.

MR. GUERRY: We offer in evidence first the entirerecord of the cause of The City Council of Dawson *vs.* The Dawson Waterworks Company, in the supreme court of Georgia, attached to our answer and duly certified, including, of course, the judgment of the supreme court—the entire record in that case.

Objected to as inadmissible and irrelevant.

After argument the master overruled the objection.

Record in Supreme Court of Georgia.

GEORGIA,
Terrell County.

Be it remembered that heretofore to-wit during the May term of the superior court for said county for the year, 1898, there came on to be tried, on the 5th day of July, 1898, the cause of The Dawson

Waterworks Co. *vs.* City Council of Dawson, before the Hon. H. C. Sheffield, judge of said court, then and there presiding the same being a suit against the said defendant for the sum of two thousand dollars upon an express contract therein set forth.

The plaintiff and defendant introduced oral and documentary evidence before the court and jury, of which the following is the brief of so much of the written and oral evidence introduced in said case as is material to a clear understanding of the errors hereinafter complained of.

607 Plaintiffs introduced the contract entered into by the City of Dawson and the waterworks company as shown in the ordinances of the city of Dawson, the sections which are briefed as follows:

SECTION 231. Grants to R. L. Bennett, of Philadelphia, his associates, their successors and assigns, who are able to organize a company to be styled the Dawson Waterworks Co., the exclusive right and privilege for a period of ninety nine years to construct, maintain and operate a system of waterworks for supplying said city and its inhabitants, and for protection against fire and for domestic, sanitary and other purposes.

SECTION 232. Grants authority to lay water pipes and mains in the streets and avenues of said city as the same are now open or may be extended to dig ditches and trenches in the streets.

SECTION 233. Right to erect buildings and tanks and lay pipes, erect other structures and make improvements on lands owned and controlled by the city except public squares.

SECTION 234. The said company, its successors and assigns to build and have in operation in 18 months a complete and thorough system of waterworks, laying four and 8/10th- miles of pipe, sizes, 8, 6 and 4 inches in diameter, with reservoir of not less than 40,000 gallons capacity, and of sufficient height to produce a pressure on the mains such that from any hydrant located on the principal streets, a stream of water will be projected fifty feet vertically, in still air, through 100 feet of fire hose with a one inch nozzle attached.

Said company or assigns for completion of system of waterworks until their charter shall cease shall be required to furnish a sufficient supply of water for the purpose before and hereafter
608 mentioned, unless prevented by unavoidable and providential causes. In such an event they shall be allowed a reasonable time to make repairs, and if after such reasonable time shall have been allowed, they should still fail to furnish said supply of water, their franchise from that fact shall be forfeited.

SECTION 236. The city of Dawson, in consideration of said company guaranteeing to it for the period of 20 years, and as long thereafter as the said company, its successors and assigns, shall continue to operate the waterworks, a free and unrestricted use of water in case of fire, and for protection against conflagration, and agreeing to establish at convenient places along the line of its mains fire plugs

of approved pattern, not to exceed fifty in all, until the corporate limits of said city are extended and the population of said city increases so that there are 500 persons living in said extension, after which they shall be increased proportionately if required. And, as an additional fire protection to furnish water to fill the present public cisterns, if needed, the said water to be used exclusively for fire purposes only, and the said water to remain the property of the said company, except in case of fire, obligates itself to pay to the said company, or to such trust company as the Dawson waterworks may elect or decide upon as their trustees for their bonds, the sum of $2,000, annually for 20 years, in semi-annual payments of $1,000, each on the first day of January and July of each year, the first payment to be made on such of said days as occur after the completion of said works as provided in section 234 of this ordinance; and in case said city shall not have sufficient funds at any of such times to make said payments or for any cause does not pay said money at times fixed as aforesaid, then in that case, warrants shall be
609 issued on the city treasurer in favor of said company for the amount due.

SECTION 237. The council shall and they are hereby required to make a provision each year for the payment of $2,000, as provided in the foregoing section, by levying a tax sufficient for that purpose upon the taxable property of the city.

SECTION 238. The company and their successors and assigns is granted the right to make reasonable rates and regulations for the government of private consumers in the use of its water, and to charge such rates for its use as it may from time to time establish. Provided, the rates charged per annum shall not exceed those named in the schedule attached, which schedule is immaterial.

SECTION 239. In consideration of said company agreeing to furnish water to the public municipal buildings and further agreeing to furnish water to two public fountains of one inch nozzle each, the City of Dawson obligates itself to remit to said company, its successors and assigns, any and all license fees, taxes, dues and charge which may at any time hereafter be levied or assessed by said city against said company or upon the plant of said system.

SECTION 240. Full assent of the city is given to a charter to be granted by the legislature of the State to said Bennett and his associates, and their successors or assigns, or to be obtained by them under the general incorporation laws of said State, incorporating them into a body politic, to be known as the Dawson Waterworks Company, and granting said company the exclusive right to contract, etc. as herein stated.

SECTION 241. Provides that the ordinances shall be mutu-
610 ally binding upon the City of Dawson and R. L. Bennett and associates; and the company to be organized and to have the same force and effect of a contract between the respective parties as if drawn in form of a contract and signed by the contracting parties.

Also SECTION 235. The company to extend mains and pipe and en-

large the plant of system generally to meet increasing demands from growth of city.

Date of ordinance, February 21, 1890.

It was agreed by counsel on both sides that the evidence taken in the same case on the trial of the case in November, 1896, should be considered in and used on this trial, a brief of which is as follows:

J. H. DAWS, sworn for the plaintiff, testified in substance as follows:

Am superintendent of the Dawson Waterworks Company, have been for 5 years. I superintended the construction of the waterworks of the Dawson Waterworks Company. Work was begun in the early part of May and continued during the entire summer without interruption until about the middle of August. That was in 1891. The number of hands we had work varied, averaging from perhaps 25 up to 100 or 125 at a time. The men worked all over the city at different times; always on the streets; the streets themselves showing the signs of the work. The city authorities accepted the waterworks; they were entirely satisfied with them. There were no complaints made in regard to the sufficiency of the service. I was familiar with the terms of the contract, and in no particular did the service fail to meet the requirements of the contract, we exceeded our contract, giving them a better supply and a stronger supply of water. The contract required us to throw a stream 50 feet vertically through still air through 100
611 feet of fire hose with one inch nozzle attached. At the time of the test we had three streams, two from one hydrant and one from another, and they threw water 72 to 75 feet high. The authorities paid the water rent up until the latter part of 1893, including that year. That was about 2½ years. During that time there was no complaint whatever on the part of the city about the service that was furnished. The water was at all times present under the contract up to 1895. I was here but not all the time, in Dawson, in 1895. I only staid here a few days after the official test was made of the waterworks in 1891. Was here all the time during the construction and a few days after the test was made, possibly three weeks. I was here during the year 1895. While I was here the system was apparently in first class condition. If there had been any break down in any of the working apparatus of the system, I would have been notified at once. If there had been any break down and the people at my head office had not reported it, it would not have continued broken down. I inspected the waterworks myself during the year 1895. At that time they were in first class condition. If there had been any part of it broken down I would have discovered it from the inspection. There was no complaint as to the pressure or quality of the water that I recollect. I might qualify myself a little by stating that on one or two of my trips here I did have a talk with Mr. Baldwin; he was probably the only one that raised any objection to the service. That was, I believe, in

1894. Prior to 1894 there had been no complaint ever raised. That was possibly after the litigation that was commenced in 1894. Other than these two visits I made to the city, I of course am not competent to reply as to the pressure that was furnished dur-
612 ing the year 1895, but I know as to the waterworks themselves. I am not in a position to testify as to the cost of the waterworks as much as the secretary. They accepted the waterworks as in compliance with the contract. They simply told me that I have complied with the contract. I put a pressure on to throw a stream from 72 to 75 feet high. I judged by a building which was a certain height; 62 feet is my recollection what the corner pillar was. We threw water about 15 feet higher than the pillar. If the building was not but 48 feet high it was not but 63 feet. I was here at least twice in 1895. Staid about 2 days each time. The waterworks was running while I was here.

J. A. HORSLEY, also sworn for plaintiff on former trial, testified in substance as follows:

I am foreman of the Dawson Waterworks Company and was during 1895, having the active management and charge of the waterworks during that year. I think I am familiar with the contract between the city and the waterworks Co. Under that contract water was furnished to the city in 1895. The pressure was kept up during the whole of the year. The water was on and ready to be used. Fire protection was furnished during the whole of the year. There was a fire in the bakery right back of the Farrar building in 1895; could not be positive that it was in 1895 or the latter part of 1894. The best of my recollection is that it was in 1895, early part of the year. It was back of the Farrar building in the bakery. It was put out. Whenever they take water out of the cisterns they are filled again. The city cisterns during last year were filled by the water company. I filled them twice.

Q. How came you to fill them during that time?

A. The engine was tested and the streets were being sprinkled.

613 Q. Whose engine?

A. The city of Dawson.

Q. Whose streets was it that were sprinkled?

A. The streets of Dawson.

They used the cisterns in testing the engine and sprinkling the streets; and when they were emptied I filled them again. I am sure that I filled them once in 1895, my best recollection is twice. There are two fountains within the city on the public streets but one of them is out of repair and one on Main street is kept up all the time. The city owns them and has been keeping them in repair. These fountains were kept supplied with water in 1895. The other one got in such shape that we had to cut the water off two years ago. The waterworks company offered to comply with the provisions of the contract about putting water in the city council room.

When they bought this hall over here I told them that whenever they got ready to have the water turned into there I would do so. That was last year, I think. I made the offer to the city council one night when the body was in regular session. The plumber repaired this fountain several times and made out his bills and I sent it to the city council and it was paid by them. Besides the fire protection of the waterworks and plant, the city had a chemical engine here for awhile. The cisterns and the engine are the only thing I know of in the way of waterworks. At the fire in 1895 no water was used besides that of the Dawson Waterworks Co. The city has not put in any other water or fire protection during the year 1895 that I know of. I have seen none. I would have known it if they had any other. The city had cisterns over town and had a fire steamer before the waterworks were completed. These cisterns sometimes got supplied from the houses. They have the same arrangement they had prior to the comple-
614 tion of the waterworks. I don't know it. They wanted to test the engine down at the cistern one day and took some water out of it and I put the water back. I don't think I did it contrary to the statement and orders of the mayor. If the mayor told me that the city was not dependent upon the company for water and if I put the water back I did it at my own volition, I don't recollect it. He did tell me that the city council was not responsible for any water that the company might furnish. I don't remember that this was in the fall of 1894. He told me once or twice. I cannot be positive as to whether it was about the time the letter was written notifying the company that the city had abandoned the contract. No one requested me to fill the cisterns at the time mentioned and it was after I knew the city had abandoned the contract and had so notified the company. I do not know that since the fall of 1894 there has been no fire company. I do not know that since 1894 there has been no meeting in this city of any fire company. I do not know of a single meeting that has taken place since the fall of 1894. I was at one time a member of the company and never resigned. I am a member yet so far as I know. I could not say that we had a meeting since the fall of 1894. There was a fire up here at the bakery. It was the latter part of 1894 or the first of 1895. The hose was brought here on the reel belonging to the city, I think. I think I know it did. It came from the engine house. I think all the hose that belonged to the city and fire company both was kept at the engine house. I don't know that there is any difference in the city's and the private hose. I consider it all the same. When I said the fire company, I mean that the whole of it belonged to the city. I know that at that time the fire com-
615 pany was under the control of the city, because we are exempted from paying taxes. I know I am exempted from paying taxes because they do not request me to pay. That was in 1894 and 1895. I paid no street taxes last year; was exempted. I worked with the fire company last year. It was under the control

of the city like it always has been. I think I know that to be true If the city abandoned the fire company I did not know it. I did not object to their using the water at that fire. It was after they had notified me that they had abandoned the contract. I think Mr. Sales and *several members of the fire* company were there and turned on the water.

Mr. L. D. HATCHER, also sworn on the former trial, testified in substance for the plaintiff as follows:

I was considered a member of the fire company here in Dawson last year. During the year 1895 the city did not furnish me with water for putting out fires from any different sources from what they did the year before; the same system that had been used in previous years. There was not any notice given me by the city that I know of. Don't remember that any notice had been given me that they no longer had the privilege of using the water from the fire plugs. There were two fires in 1895. I did not get out to one. I am not sure that it was in 1895. This bakery up here was one of them. My best recollection is that the bakery fire was in 1895. I attended that one as a member of the fire company. Got water from the hydrant on Main street; from the fire plug of the Dawson Waterworks Co. The city hose put it out. The water from that hydrant put out the fire. The city remits the street taxes as exemption to the members of the fire company. There was no change in that
616 last year. They demanded the tax of me and I claimed exemption on that ground and it was not enforced. Mr. Carver was foreman of that company. They have not had a meeting for some little time. Have not attended a meeting for two years. Don't think I attended one in 1895. The city has for a long time been exempting several persons from street tax on account of military and fire department. I think there were certain rules governing that fire company. All the rules were not enforced. The fact that they gave their personal service and paid dues is the reason the city exempts them from paying taxes. I have paid some for 4 or 5 years. Don't think I did last year. Am not certain whether there was a meeting last year. The fire company had stated meetings. They were fixed. Don't know that Mr. Carver resigned his foremanship about three years ago. A successor has never been elected. Don't think I have heard of any foreman except Mr. Carver. Never attended any election. There was no chief of the fire department that I know of. Don't know that we ever had a chief. Had a foreman. It is true that every body and any body went to the engine house and got out the engine when they needed it at the fire. Anybody went and got the hose reel. It is not always true that negroes do the job. Negroes and white men together; no particular set of men for that duty within the last two years.

Q. Did the fire company meet on the 3rd Monday in January 1895, in the council chamber and elect a chief of the fire department?

A. I- did not.
Q. Do you know of any such meeting?
A. I do not.
Q. Did you elect any assistant chief?
A. No, sir.
Q. Did you at that time hear a report of such election?
A. No, sir; I don't know whether any such report was made or not. I don't know whether the city council ever approved
617 of such an election or not.

Q. Mr. Hatcher, don't you know that prior to the fall of 1894 every member of the fire company had a key to the engine house?

A. I have got one now. I know that since that time the engine house has been open. Anybody can go in there. Nobody takes charge or care of the engine house now. It is open. I think the fact is things have been in that shape ever since the fall of 1894, may be even longer. I think they have been in that shape since 1892. There was no fire that was not put out during last year. Besides this engine there is one down by the Variety works on top of the public cistern. I don't know whether it is kept locked. The city has reels down there.

Q. That is in charge of and under the control of the Variety works isn't it? Before the waterworks were established they put out fires with an engine, a fire stramer they had down there?

A. I don't remember whether they had an engine at the time this block was burned.

Q. There hasn't been a serious fire since the waterworks were in?
A. No, sir.
Q. There hasn't been one that got under headway?

A. I think not. If the foreman of the fire department or company wasn't there when a fire broke out, the fireman went ahead and put out the fire. The hose was owned by the city. It was kept in the engine house. The city owned the engine house.

BILL PATTERSON, (colored), sworn for the plaintiff on said occasion (1896), testified in substance as follows:

I was the colored chief of the fire company last year.
618 The city gave them exemption from street taxes and other city privileges. I think there was thirty some odd in my company; they got exemption from street taxes; they got the exemption last year. We had 42 members last year. The city furnished the company hose, reel, nozzle, spanners, etc. They are kept in the fire company's house. The city council owns the house. The city council owns the reel, hose, nozzle, spanners etc. They are not kept under lock and key. They do not lock the doors. The engine house that I speak of is right across over there (meaning on the square). It is the same one that the white fire company uses. My company went out to a fire last year around here at the bakery shop. We used the hose and other things. We got the water from the

plugs in the street here; the plugs of the Dawson Waterworks Company. We used water from no other source at the fire. There was no other water for us to use. The fire was put out by that water by the fire company. No other hose used at the fire except the city's hose. Think Mr. Baldwin was at the bakery fire and the Melton fire. Don't remember that he gave my company any notice that the city

Q. Did he ever stop you from using it?

A. He told me individually. I was talking about sprinkling the streets.

Q. About fires?

A. No, sir. The city turned us over some hose, reels etc., 4 or 5 years ago. The city has exercised as much control over me and the fire company as they ever did. I have talked to Mr. Baldwin about it in the last two years. We wanted to go to Columbus. I did not know in 1895 there was a controversy between the waterworks company and the city. Mr. Melton and the city council ordered me to give a list of the members in the first part of the year, 1895. He proposed to exempt them from street taxes.

Q. What authority did the city council take over you?

619 There was no chief of the fire department?

A. Mr. Clark has been acting at the fires as boss. No chief was elected to the fire department. The fire hose and things were got from the city 4 or 5 years ago and we simply obtained possession of them.

Q. Mr. Baldwin never pointed out any water for you to use?

A. We always got it at the plugs. The city council never pointed out any water for us to use. The city council never instructed us to use it any more than that they bossed at time of fire.

Q. Who do you mean by boss?

A. Mr. Savage bossed.

Q. Was he a member of city council?

A. I considered him a member of city council. He never opened the water for us. Don't think any member of the city council ever did so.

Q. Did you have any authority from any member of the city council to use the water of the waterworks company since 1894?

A. Not particular. No more than we just always used it. No member of the council gave us authority. I didn't try to get permission from Mr. Baldwin, mayor of the town to use the water to practice when we wanted to go to Columbus last year.

Q. Don't you know that Mr. Baldwin was elected mayor in the fall of 1892 and has been in office ever since?

A. I might be mistaken as to that, but at the same time if Mr. Baldwin was mayor at the time we wanted to go to Macon, we practiced at his plug here and then over by the Masonic hall.

Q. Well now, at the time you made your practice runs over by the Masonic hall, didn't you go to Mr. Baldwin and ask him for

leave to use the water and he told you you could not, and then didn't you go to Mr. Horsley and get leave to use it?

A. No, sir; Mr. Carver, the chief, went to Macon with us.

620 Q. Did you go or make any preparations to go to Columbus any time last year?

A. No, sir, never went anywhere. We elected our own officers. We didn't adopt our own rules and regulations and by-laws. The very first fire company we had got a book from the city and the other fire company. Got a little book from Mr. Baldwin to keep our minutes in and a little book of by-laws to go by. I suppose it was the by-laws used by the other fire companies. We adopted them as far as they would go. We adopted our by-laws and rules and governed our own organization. In 1895 or the fall of 1894, I asked the mayor for the privilege of getting water and sprinkling the streets and he declined to let me use it.

Q. And didn't you go to Mr. Horsley and get permission?

A. He did in 1895, but he didn't in 1894. It was during the dry spell in 1895; think it was in September. We wanted to use the water to sprinkle the streets.

Q. You knew that under the contract they had no right to sprinkle the streets with water?

A. I don't — anything about the contract.

Q. He never forbid you to use the water for fires?

A. No, sir.

Q. Didn't he tell you at the time, Bill, that the city council and the waterworks were at outs and he had no authority over the water?

A. Several of the store keepers were asking us about sprinkling the streets, and I went down and asked Mr. Baldwin about getting the water, and he said to me: "Bill, I have no right to give you any orders about the water at all. There is a law suit pending, and I haven't got any right to give you any orders or permission." He told me that there was a controversy between the waterworks company and the city. That was in Sept. 1895, and was about sprinkling the streets. We had a hose for getting water out

621 of the cisterns to use at fires.

Q. Could you get the water out of the cisterns with the hose?

A. No, sir; we didn't have any pressure.

Q. You know of anything that could have used the water in those cisterns?

A. No, sir.

Q. If you hadn't gotten it from the fire plugs, could you have gotten it at all?

A. No, sir; we had a chemical engine. We haven't used it for ten years.

Q. There was a steamer here?

A. Yes, sir.

Q. Did the mayor tell you that he had no authority to use it at all, or had no authority to use it in sprinkling the streets?

A. He told me that he had no authority to use it in sprinkling the streets. We belonged to the State Association and went to these fire tournaments whenever they met.

B. C. ADAMS, sworn on said former occasion for plaintiff, testified in substance as follows:

Am a member of the fire company in the city of Dawson, there at the Variety works. Was a member during 1895. I hold with the company the position of chairman and president. Am not foreman. Am familiar with the organization of the company. Think there are about 16 members. Had about the same number last year. Have not varied very much since the organization. The organization was kept up during that year. City exempted company from street taxes. Gave me an exemption last year. The company I think got out to a fire last year. There is a fire bell up here and one at the Variety works. These fire alarms belong to the city. Are used in calling out the company just as they have been all along prior to last year. There is no change that I know of from what there was
622 in previous years. The other company up town has not been very active. We have regular meetings once a month. We have by-laws. Here is a copy. (Showing same to Mr. Wimberly.) We keep up regular meetings under those by-laws every Tuesday night in each month. We have hose, hose reel and such things, that belong to the city. All that is necessary to use at fires. They belong to the city. They are kept right down in front of the office of the Variety works in the streets of the city. I suppose the city owns the house they are kept in. It is in the middle of the street. It is built over one of the tanks that belong to the city. The cistern or tank itself is not kept up. There isn't any water in it. There has not been any water in it to amount to anything for several years; not since the waterworks have been here. They didn't put it back last year. There was no change last year. The house is built over the cistern. The cistern could be used but there is not water in it. With the apparatus that we use we couldn't get water out of the cistern to throw on a fire without an engine. Haven't been using an engine at these different fires. Got pressure from the waterworks; got it from the waterworks last year. I am not certain that there were any fires last year. If there was any my company went to them. The waterworks company furnishes the plugs with water. Water and pressure were always there. The waterworks company didn't fill that cistern down there. Didn't keep it full. I cannot say whether there was a fire last year or not; I know they went to any fire that occurred. I know from the fact that when the bell rang they went. I went when I was here. I can't remember that I went last year.

Q. How do you know the company went?

A. They went whenever I was here.

Q. Don't you know that you were away nearly all of last
623 year?

A. No sir.

Q. Were you here at the time the bakery caught fire?

A. No, sir.

Q. Did your company go?

A. I can't say. I don't think I was at any fire last year. I don't remember my company going to any fire last year. I take it for granted that they went. I don't know that there was any fire last year. Of course I don't know that the company went to any fire last year. If they did go I don't know that they had any water. I don't believe I know whether they put a hose to a plug or not. The equipment that I spoke of was turned over to the fire company several years ago; they were turned over at the time the house was built. I should think it was four years ago; I think not before the waterworks company put up its plant. I think it was turned over in 1893.

Q. Well now, Mr. Adams, you say this company is kept up by itself, ain't it? It receives and refuses to take any member it pleases?

A. Yes, sir. It elects its own members. It controls all the membership of the company. It adopts its own rules, regulations and by-laws. It is an independent volunteer fire company. Don't think the fire company had any chairman last year. I don't know what they did. I suppose that Mr. Baldwin was at the head of the fire department. Don't know whether he is chairman or not. I never participated in the election of a chief or assistant chief. Never participated or knew anything about any such election. We have sent several committees to the city council. They sent me to Mr. Baldwin, I don't know that Mr. Melton was chairman of the committee on the fire department. We have been communicating with Mr. Baldwin.

624 R. A. BISHOP, sworn for the plaintiff on said former occasion, testified in substance as follows:

I was connected with the fire company here in Dawson last year, the Mechanics Fire Co. No. 1. I was foreman during last year. The company kept up its organization and work during last year. There was no difference at all last year from previous years. Our company has a hose reel and about seven hundred and fifty feet of hose on. I suppose it belongs to the city. They turned it over to us. It is kept down there by the Variety works over a city cistern. The cistern is not kept in repair so as to hold water. These appliances were used by my company last year in putting out fires. My company was called out to one fire while I was here; over here at the bakery last year. I was there with the hose reel. My company tried to put out the fire. It was put out after so long a while. The fire department put it out. Got the water from the plug over there at Frank Bethune's. The waterworks company, I suppose, furnish the water for that plug. Water was on at the time and had

pressure. It was used. I was never notified by the city council here not to use that water any more, that they had no right to use. I used it the same as I did before; put out fires with it. They exempted us from street taxes *last year, all of us; about 13. My* company regulates itself; receives and rejects members itself. It is not altogether an independent organization. We have a limit to the number of our members. They simply said they would exempt from taxation so many of us and let us refuse and reject the members we wanted.

Q. You have not paid any dues in several years?

A. Yes, sir. The apparatus that was turned over to us was turned over to us several years ago, prior to December, 1894.

625 Q. You say nobody ever told you not to use the water?

A. No, sir. We always have plenty of help. The city council have often helped us. The city council has never instructed us to use any water anywhere. It has never told us to use any water. I turned on the water at the fire up here at the bakery. Got a wrench from the hose reel. I was not ordered to turn it on by any authority of the city, but wanted to put out the fire. I would have taken water out of a well if I could have gotten it for use, if it was near the fire. I simply got there and found that plug was the most convenient and used it.

Q. Used it without any authority from anybody?

A. Certainly.

Q. Don't you know there was a chairman of the fire committee? Don't you know that R. L. Melton was chairman?

A. He has never been there.

Q. Never looked after any of your company, has he?

A. No, sir.

Q. Do you know whether there has been any chief of the fire department elected in this city in the last three years?

A. Not since we were organized. Mr. Baldwin was the last chief we have had.

Q. Didn't Mr. Carver become chief after Mr. Baldwin?

A. Think Mr. Baldwin was the last chief we have had. Mr. Baldwin may have been mayor at the time Mr. Carver resigned. I think Mr. Baldwin was elected chief before he was elected mayor. We have had no election in three years; no election for assistant fire chief. Mr. Baldwin was down there examining our house this year. Up to this year he has not been there within three years. Those things are kept under lock and key.

Mr. JOSEPH CLAY, sworn on said occasion, testified in substance as follows:

626 I belonged to a fire company last year, the Mechanics' Fire Company. It was kept up last year. I paid my dues.

At the same time the agreement was made for the use of the evidence taken on the former trial. It was also agreed that the only fire which occurred in the city during the year 1895, was that which occurred at the bakery, so far as shown by the evidence, and admitted by defendant that it occurred on the 19th of February of that year. It was further agreed at the same time that all the documentary evidence used on the former trial should be considered in evidence and which documentary evidence in addition to that already briefed, showing the contract sued upon, is brief- as follows, put in by plaintiff and defendant:

Sections of the fire regulations of said city as shown by the city publication of its charter, ordinances, etc., as follows: introduced in evidence partly by plaintiff and partly by defendant.

SECTION 89. Provides that the fire department of the city shall consist of Protection Fire Company No. 1, and such other companies as may hereafter be formed and created by the city or under law.

SECTION 90. Each company shall have power and authority to make by-laws, rules and regulations for government of its members, and amend the same at will, said by-laws not to be in conflict with the charter and ordinances of the city; and such company in existence or hereafter to be formed shall have power to fine or expel any of its members for violation of by-laws or provisions of this chapter.

SECTION 91. Each company is empowered to take charge and have the care, and management of its respective engine house,
627 engine, ladder and other apparatus for extinguishing fire which has been or may be by the city council provided for it.

SECTION 92. Provides for an annual election on the third Monday in January to elect from their body a chief of the fire department, also an assistant chief, and report the names of the parties elected to the city council, to be approved by the city council before such officers enter upon their duties. Vacancies in said offices to be filled as speedily as possible in the manner above pointed out.

SECTION 93. Provides that during fire the chief of the fire department shall have absolute control of the fire department and entire apparatus; in his absence the assistant chief; in the absence of both the foreman of the senior company present.

SECTION 94. Chief must examine not less than twice each year engine, house, engine, hose and other apparatus of the department and make written report to the council, suggest improvements and co-operate with foreman, etc.

SECTION 95. Chief shall order out at least once each year all companies of the fire department for inspection, drills, etc.

SECTION 96. Wells and cisterns shall from time to time be carefully examined by the chief and defects reported to the chairman of the fire committee.

SECTION 97. Shall report defective flues, etc.

SECTION 98. When chief is elected fire companies shall prescribe suitable uniform for chief and assistant chief, so that they may be distinguished.

SECTION 99. Provides for protection from injury, etc. or interference with any city engine house, engine, hose, cart, etc. belonging to the fire department, and that it shall be unlawful to use any of the implements of the same except for the benefit of the city;
628 loan of the same forbidden. Unlawful to ring fire alarm, use fire bell, except in alarm of fire to call companies together.

SECTION 100. Unlawful for — person to obstruct entrance to any engine house in use or under the control of the fire department of this city.

SECTION 101. All appropriations for the fire department of this city shall be first recommended by the fire committee and voted on by the council.

Plaintiff also put in evidence on said occasion an extract from the minutes of the city council of Dawson, duly carried, to the following effect:

MAY 10, 1886.

A motion was made and carried that the question of incurring expense of waterworks be submitted to the citizens of the city, and that notice of an election be run in the Dawson Journal for the time prescribed by law, and that an election be held on said question on the 11th day of June next, 1886.

Plaintiff also put in evidence the four issues of the Dawson Journal, the official gazett- of the city and county, for the four weeks preceding June 11, 1886, to-wit: the issues of May 13, 20, 27 and June 3, 1886, respectively, showing the election notice published of said election. Said notice was in substance as follows:

"*Election Notice.*

Notice is hereby given that there will be an election held in the city of Dawson on the 11th day of June, 1886, to determine whether the city of Dawson shall incur the expense of waterworks."

And also the following from the minutes, dated July 18, 1886:

The certificate of an election held in this city on June 11, 1886, on waterworks or no waterworks for said city, the result be-
629 ing in favor of waterworks, was presented and the same was received and ordered to be made a matter of record.

Admitted that an election was held on June 11, 1886, in pursuance of the notice, and that at that election more than two-thirds of the qualified voters of the city voted in favor of waterworks.

On said original trial it was agreed that the taxable property of the city of Dawson amounted to a little over one million dollars in 1886 and each succeeding year. Plaintiff put in evidence on present trial, and read to court and jury, minutes of March 8, 1895, as follows:

March 8, 1895.—Adjourned meeting of city council. Mayor Baldwin stated the object of the meeting, to-wit: to discuss the con-

dition of the fire department and to take some action to better the condition of the same. A motion was made and carried that the mayor be authorized to appoint a committee of two from the council, including himself, and two from each of the fire companies, to meet as early as possible. Councilman Dean was appointed to serve on the committee with the mayor. On the committee from the fire department, Mechanics B. C. Adams and R. A. Bishop; Protection Deubler and Clark.

Plaintiff also put in evidence minutes of city council of Dawson, of March 13, 1893, of which so much as is material is as follows:

"The petition of Mechanics Fire Company No. 2, with names of their members were received and by vote of council they were recognized as a legal fire company for the city of Dawson."

Plaintiff also put in evidence minutes of the city council of Dawson, of Aug. 12, 1891, of which the material portion is as follows:

"The purpose of the meeting was to take into consideration the question of accepting the waterworks. Mr. Dawes, represent-
630 ing American Pipe Company, appeared before the council and stated that the work on waterworks for the city had been completed, and tendered the same to the city according to the terms of the contract, and that the company would not expect any pay only from the time they begin to furnish water to the city. After testing the waterworks a formal acceptance in writing was made to the American Pipe Co.; and the following was ordered to be entered upon the minutes, viz: "The city council of Dawson, Ga., hereby accept from the American Pipe Mfg. Co., successors to R. L. Bennett & Co., the system of waterworks as fully complying with contract of R. L. Bennett & Co., afterward transferred to American Pipe Mfg. Co. After fully testing the system the same is hereby accepted from this date in full compliance with said contract, and in many particulars exceeding contract, and none being less than called for in contract."

On said former trial the defendant put in evidence letter of Dec. 14, 1894, to American Pipe Mfg. Co., which in brief is as follows:

"GENTLEMEN: The contract entered into between the City of Dawson and your company being illegal, it will require annual contracts. By direction of the city council of Dawson I write to know what your company will charge the City of Dawson for use of water in the same way as heretofore used by them from January 1st, 1895. We think the amount heretofore charged per annum is entirely too much, in fact exorbitant. If your company will make reasonable terms we will enter into a contract with you for one year from January 1st, 1895. If we cannot agree, you will please consider this as notice that this council will not longer be liable under your contract after January 1st, 1895.

(Signed) A. J. BALDWIN, *Mayor.*"

Defendant also put in evidence on said former occasion a letter

dated December 17, 1894, written by the Dawson Waterworks
631 Company in reply to said letter of Baldwin, which in brief is as follows:

'Baldwin, mayor, Dawson.

DEAR SIR: Your communication of the 14 at hand. We forward it this day to our attorneys, Mess. Hoyl & Parks; and respectfully refer you to them.

(Signed) JOSEPH S. KEEN, JR.,
Gen. Mgr. Dawson Waterworks Co.

Also a letter dated January 29, 1895, to Baldwin, mayor, from the Dawson Waterworks Co., by H. Bayard Hodge, sec'ty, in further answer to the letter of the 14 of December, 1894, which is briefed as follows:

Yours of the 17 December to us by authority of your city council about making new contract for fire protection for your city upon a yearly basis and at reduced price per annum, setting forth as your claim the illegality of the contract now in force between the Dawson Waterworks Co. and the City of Dawson and concluding by stating: "If we cannot agree you will please consider this as notice that the council will not longer be liable under the old contract after January 1st, 1895." It is useless for us to enter into a discussion at this time as to our reasons for not considering your proposition, as they are fully known to you. And in reply to you, we can only say that the contract which was entered into between this company and the City of Dawson was done in good faith and as far as we are concerned was fully and honestly complied with, and that we have ever since fulfilled our part of the agreement in each and every particular; and that we fully believe that our contract with your city is a legal one; and that the charge made to your city for hydrant rental is an extremely reasonable one. We are perfectly satisfied with the contract that we have entered into with the city of Dawson, and wish to say here that we shall continue to maintain
our fire pressure in future the same as in the past, and your
632 city fire department will find our fire hydrants ready for service whenever they may be required; in fact, always ready for use. We shall present our bills for hydrant rentals to your city when due, and shall expect the city to pay same.

Defendant also on said trial put in evidence extract from the minutes of the city council of Dawson, of December 13, 1894, briefed as follows: Mayor Baldwin was by motion instructed to correspond with the Dawson Waterworks Co. concerning water contract for 1895.

The defendant also at said time put in evidence the following documents, which are now briefed:

Resolution passed by the city council of Dawson, June 27, 1894, as follows:

"The matter of purchasing the Dawson waterworks was next considered. Several letters and answers relative to same were read and considered, and after thoroughly discussing, the following resolution was passed: Resolved, that the city council of Dawson decline to carry out the contract as to water for city purposes of the former council with the Dawson Waterworks Co.: and that a committee be appointed to make such arrangements as will be satisfactory with the council and the waterworks company. His honor appointed on said committee Aldermen Davis and Dean. Whereupon, it was moved and carried that Mayor Baldwin act with said committee."

Also letter dated June 27th, 1894, to the Dawson Waterworks Co. Philadelphia, signed by W. H. Davis, chairman of committee, as follows:

"The city council of Dawson, at their meeting this day had, determined not to continue the contract with your company by which the city pays $2,000 per annum for water. Therefore we
633 write to notify you that the city council will not be bound by any contract heretofore made with you for water. We would be glad for you to send a man here to confer with us and let us come to some agreement by which the friendly relations of the past can be continued."

Also letter dated July 3, 1894, to A. J. Baldwin, mayor, signed by Wm. S. Perot, Jr., treas., as follows:

"We are in receipt of a letter from W. H. Davis, chairman of com., saying "the city will not be bound by any contract heretofore made with you for water;' also asking that friendly relations may be continued. This is refreshing indeed for such hot weather. The same day we received a copy of an injunction asking the court to set aside this contract after you induced us to spend over $40,000 there. Owing to such unexpected news and complications as these being sprung upon us, we feel at liberty to withdraw the offer made you a few days ago putting a price on our property. Can you inform me if the city intends to take the side of sustaining an honorable contract, or do they propose to try to repudiate it?"

Also copies of the Dawson News, the paper in which the legal advertisements of the county of Terrell are published, calling for an election on December 12, 1894, to determine whether or not the city council be allowed to issue bonds in the sum of $35,000 to erect or buy waterworks and electric lights for the city of Dawson.

Defendant at said time also put in evidence advertisement from the Dawson Journal, May 13th, May 20th and June 3rd, 1886, showing publication of notice of election which is briefed as follows:

Notice is given that there will be an election held in the city of Dawson, on June 18, 1886, to determine whether the City of Dawson shall incur expense of waterworks or not.

Done by council.

W. R. BALDWIN, *Mayor.*

634 Mr. A. J. BALDWIN, sworn for defendant on said former occasion, testified as follows:

I was mayor of Dawson in 1894 and in December of that year, wrote this letter of Dec. 14, 1894, to the American Pipe Mfg. Co. I was appointed to write them this letter. After this letter was written the city council, never, either themselves or through authorities gave any one permission to use this water for fire purposes or for any other purposes. The abandonment of that contract and the notice given was in good faith. After Dec. 14, 1894, if there was a fire company in Dawson, it was not controlled by the city council. No fire chief or assistant fire chief was elected in 1894 or 1895 that I know of. I was fire chief at one time. Mr. Laing was assistant. Don't know who took charge when I went out. Don't think Carver did. Nobody was representing the office of chief or assistant chief of the fire department of Dawson in 1895 that I know of. The city council did not by itself, directly or indirectly, or by others directly or indirectly, authorize the use of water for fire purposes that I know of, nor for any other purposes. We have given instructions that the council was no longer under contract with the waterworks company. The city council has not kept up this fountain down here for 1895; has paid nobody any thing to fix it up that I know of. I am mayor of the town. My instructions have been that they should not pay anything for it. R. L. Melton is chairman of the fire committee. I heard Bill Patterson testify as to the use of water. Think it was in 1894 that he came to me to get permission to use the water. Am not certain; think it was in the fall of 1894. At that time I made no objection. Don't know of any meeting of the fire company within two years. No regular fire company carried the hose reel to any fire since 1894 that I know of. If there had been I think I

635 would have known it. There was no chief or assistant chief of the fire department elected in 1894 or '95. No such officer in existence during either of those years. No report made to the city council as to the engine, engine house, reel, hose or other apparatus belonging to the department. No fire company in existence in '94 and '95 which the Dawson city council recognized as a fire department that I know of. I was mayor during that time. I never authorized any of these companies to use water during '95 since December 31st, 1894. The first citizen that gets there takes charge of the fire apparatus in time of fire during last year; it was supposed that the first citizen who got there would take control.

Q. Where did you suppose they would get water in '95 with which to put out the fires?

A. I made no preparations. I reckoned we would put out any fires during that year.

Q. Your idea was to let the town burn up?

A. My idea was to let them extinguish it in the best way possible.

Q. Mr. Baldwin, your purpose was during 1895 that the city was to have no water with which to put out fires?

A. Didn't have any such purpose as that. We had cisterns here.
Q. What water did you intend to furnish during 1895?
A. The same as we had before the waterworks were put up.
Q. How did you expect them to use it?
A. With an engine.
Q. You say there was no fire company here to use an engine?
A. The citizens could use the engine. They were ready to turn out at fires.
Q. Don't you know that it never turned out to any fires during 1895?
A. I don't know that. I think perhaps it did turn out at one time. I don't think they paid Mr. Deubler a salary as engineer during 1895. I am satisfied they did not. I don't know that to run an engine a man has got to know something about it. If we had ever paid an engineer I don't know it. Don't think we elected an
636 engineer last year. I never notified Mr. Deubler that we had quit getting water from the water company and that he would have to pump it out of the cisterns and therefore be on hand. I took no special steps to rely on that engine. We had been relying on it before.
Q. Before '95 you had waterworks?
A. Yes, sir.
Q. But after you quit having waterworks you took no special steps to rig up that engine and pay an engineer?
A. Had the same steps that he had heretofore. The engine was put in order and worked on I don't know how many times.
Q. You say there was one fire the engine wasn't at, didn't you?
A. Yes, sir.
Q. Do you know that it was at any of them last year?
A. I don't recollect that it was.
Q. When you saw that engine wasn't there did you take any steps to carry it up before council that you had no water supply except in the cisterns, and that in order to use that water in the cisterns you would have to pay an engineer?
A. Took no steps of that kind. The council took no steps in arranging for an engineer in 1895 that I know of.
Q. Did you notify the fire company or anybody that was using this city hose and apparatus that the water didn't belong to the city?
A. No, sir.
Q. You knew that in previous years they had had authority?
A. Yes, sir.
Q. Whom did you notify that you had repudiated the contract?
A. I notified Mr. Horsley that we would no longer be responsible for it.
Q. You say that in previous years they had used the city's water? You know they were notified of the contract?
A. Yes, sir.

Q. You notified Mr. Horsley in his capacity as a member
637 of the waterworks company, didn't you?

A. Yes, sir.

Q. You didn't notify him because he was a member of the fire committee?

A. No, sir; he had nothing to do with it.

Q. Your purpose was that when you notified the waterworks company that you would quit using the water, you meant that you wouldn't pay for it any more?

A. No, sir; I had no such purpose.

Q. You had no contemplation that the water itself wouldn't be here?

A. I supposed that it would be here.

Q. And you supposed that in case of any fire it would still be used?

A. I supposed that as far as I was concerned I should use it just as I would at any other time.

Q. As an individual did you ever pay the water company anything?

A. No, sir.

Q. Did you ever offer to do so?

A. Never offered to do it.

Q. It was your expectation that the water would stay here but the city was not to pay for it?

A. I supposed the water would stay here.

Q. And on that supposition you didn't rig up your old engine or employ an engineer or take care of your cisterns?

A. The engine was kept in repair.

Q. I am not asking you about repairing the engine; I said cisterns?

A. They were not out of repair that I know of. I don't know that this one down at the Variety works was out of repair or would hold water. Don't know that it has never been worked on since the waterworks company was here. Don't know that these other cisterns are filled by the waterworks company. I don't know that any of their water goes into them; never looked to see; never inquired.

Q. It was the purpose of the mayor and city council here to leave the city of Dawson without fire protection in the way of water during the year, 1895?

638 A. We had protection from the engine and cisterns.

Q. How many cisterns have you got?

A. Don't recollect. Can count them; there's six or seven.

Q. How many of these are in repair so that you can get water without the help of the Dawson Waterworks Company?

A. Perhaps all of them. Have examined them somewhat; but can't say how much water they had in them. Didn't look to see where the water came from. Don't know that the waterworks company put it in there. Disn't try to know whether they put it in there or not. It was the expectation of the mayor and city council

that the city would have no fire protection during the year 1895 except the water in these cisterns and one fire engine. It was our intention that they should use the fire engine in case of a fire if the citizens saw fit. I never notified the citizens or the fire company. I never notified any people at the fire.

Q. You were at the fire and saw that they were using the water out of the plugs?

A. I was not there as mayor.

Q. Mr. A J. Baldwin, not mayor, was there; is that right?

A. Yes, sir.

Q. And that Mr. Baldwin took part in putting some water on the fire out of one of these plugs?

A. Just as I would take a bucket from a man passing by and extinguish it if I could. There was no engine there and the city had no engineer. Council took no steps to pay an engineer.

Q. Would you have rested very securely as a large property owner here if you had thought that your own protection was an engine that didn't have an engineer and wasn't expected to be at any fire?

A. I have always rested very easy. I have never lost any sleep.

Q. Would you have done it if you had thought the only protection the city had, or that your property had, was the
639 chance that that engine would be brought out?

A. I don't think I would be any more uneasy than I am now. The exemption from street tax was given persons in 1895 on the ground that they attended fires. I asked parties to furnish a list of those who attended fires. I arrived at part of it myself. I believe I asked the marshal to furnish me a list. He got up the list except some that I suggested myself.

Q. Did you tell him who to get it from?

A. No, sir. The colored fire company got their exemptions. The marshal got the names of that company from Bill Patterson. I knew they were claiming to act as a company, but it wasn't recognized. I knew that they ought to have something for attending fires. I don't know whether they attended fires because they considered themselves a company or not. I don't know who is at the head of the negro fire company. I told the marshal to see Bill Patterson and the rest of the negro boys. I knew that Bill Patterson was at nearly all of the fires. I never gave anybody that I saw at an occasional fire an exemption. There were some of them that were more prompt attending fires than others, and this is what I had to go by. I don't know how many they allowed them as members. I don't know whether they got a list from the head of the fire companies or not. I told the city officer to ask Bill Patterson and another one of them to give us the names of them as attended fires. I don't recollect that I told him to ask any white persons. I suppose he had a list of white persons. I know they claimed a company down there at the Variety works last year. I don't know whether the city gave them exemptions and left real estate and

other property down there in their charge, and furnished locks to keep them locked up. The house was built by individuals in the streets. The house belongs to the city. I really don't know how much hose they have down there.

640 By the COURT: Did you exempt anybody else from street tax whose name was not on the list of those companies?

A. Yes, sir; we have. We did not have any rule. Mr. Deubler, Mr. Clarke, and Mr. Horsley are exempted. They are not on any company. I don't know that Mr. Horsley belongs to one of these fire companies; Mr. Horsley was a member when it was a company; Mr. Deubler was also. Mr. Clarke was too; Mr. Clarke was foreman of the company when it was in existence. I mean it was not an organized company. I still give it the privileges of a company in the way of exemptions. Some of the men who belonged to the company were at the fires. I don't know who carried the hose to the fires. This company down at the Variety works didn't have an engine. I supposed this engine up here could get water out of the cisterns for them. I expected the engine to supply all three companies. I think the engine is intended for 2 or 3 hose; two "Y"s on each side. I didn't notify the company that they would have to get their streams from the engine in future. I didn't think that I was a guard for the waterworks company. City council didn't take any steps to furnish an engineer more than they had before. The same engineer was supposed to act.

By the COURT: Did you allow any exemptions from street taxes to anybody except those who were on the company existing now, or were on other companies that are not now organized?

A. I don't recollect who we did allow them to. My recollection is that we brought it before council and decided to allow it to those who took an active part at fires. The city never elected an engineer that I know of. He was elected by the companies or organizations that existed prior to the waterworks. The city council didn't consent to the attachment of any hose to any plug after December 31, 1894. We never acted in council upon that question and

641 gave consent to do so. I was at the fire at the bakery. Took part in it. Don't think I helped to manage the hose. Might have taken hold of the hose and helped pull it around. The hose was attached to one of these fire plugs. Baldwin, Geiss & Co. didn't have anything to do with that fire. Don't think Tommy Geiss gets an exemption. I don't think the city ever objected to using these water plugs. I wasn't objecting when I was helping pull the hose around. I never heard any of the rest of council object. I never told them to wait until the engine came. I didn't wait for it myself. I think there are forty fire plugs here and seven cisterns. Some of the cisterns are outside of the business part of the town. Very few of them are. I never attached any hose to any plug myself. It was simply used by me after I got to the fire and found it attached. After the election of 1886 the cisterns were put in, in the way of incurring expense for water supplies. Two of the cis-

terns had been in prior to that election. I don't know that you ever call cisterns waterworks. I don't think cisterns are called waterworks. I think there were five cisterns put in after that election. I never heard them called that.

It is agreed between counsel that there was only one election on the question of incurring indebtedness for erection of waterworks prior to the erection of waterworks, and that was in 1886.

(Witness resumes:) I don't really know how much the cisterns cost. I suppose they cost from $250. to $400.; I know they cost more than $100. One of them down here at Baldwin's store is 20 feet across and 20 feet deep; I know it could not be put in for less than $250. I don't recollect when those cisterns were put in.

642 R. L. MELTON, sworn on said occasion for the defendant testified in substance as follows:

I was a member of council in 1894 and 1895. In the action of council since the 31st day of December, 1894, no authority has been granted to anybody directly or indirectly to use the water of the waterworks company in behalf of the city. The action of the council in refusing to use the water in 1895 was in good faith. In 1895 I was chairman of the fire department. My duties were to look after the hose, apparatus and companies. I had the engine repaired and looked after the hose. I did not say look after the fire companies. I didn't look after them because they did have any. All I know about *their* being any recognized fire companies in Dawson in 1895 is that they gave me some names and notified me that some of them were to be exempted from street tax. We looked over the list and did exempt some of the parties. The department had no connection with the city council; they were in no way under the control of the city council. The city had nothing to do with their by-laws, regulations, rules and constitutions. While I was chairman of the fire committee we had applications once or twice for permission to sprinkle the streets and I told the parties that we had nothing to do with the water; to go see Mr. Horsley in reference to it. I think 2 or 3 parties made application. I told them that council had nothing to do with the water. I didn't instruct the fire department to use it because the city did not have the right to. I think I was a member of the council in '85 and '86. After the election in 1886 I think we put up some cisterns and at one time started to build a wind mill. We did build a hose tower. I can't tell you what class of people made applications for exemptions and got them. Mr. Savage brought in a list and we took the names of different people
643 in town. Not men, women and children generally. I suppose parties that had been in the habit of going to fires. I don't know that there was any organization. If there was any organization kept up by these men during that year I don't know it. I think we told the negro company that we would allow so many exemptions. I think the negro-s themselves selected their own men.

I think Bill Patterson had something to do with the selection of the men. They may have had an organization. I did not inquire around very much to see whether they kept up the organization or not. I don't know that this crowd had monthly meetings down there at the Variety works. I think I attended some fires during 1895. I think that some of the people that we exempted were at those fires. When these people came there I suppose they got water out of the hydrant with which to put the fire out. I know that they used the hydrants at that fire. I didn't try to stop them. I don't recollect that I ever got a list of the exempted men and told them that they could not use the water any more and to make other arrangements.

Q. Did you at any time ever tell any man that was exempted from street taxes that they must use water out of the cisterns hereafter and not out of the hydrants or that the city had terminated its contract with the waterworks company?

A. I think I did. I had the engine fixed up. I can't be positive who I told. I think I could be positive that I told some one; can't recollect any individual I told. This engine did not have any special engineer. The engine cannot run itself. As chairman of the fire committee I never took any steps to find a competent man to run the engine after we no longer had the waterworks and would have to run the engine to put out fires; I never made any arrangements or employed any engineer. The engine takes a driver that understands
644 it. I don't recollect who I ever saw run that engine in 1895. I don't mean I saw no one run it during that year. I saw it pumping water. I had it brought out once to test it. I never saw it used at a fire during '95. Think they used water out of one of those cisterns in testing the hose. Water in this cistern had been put there by the waterworks company. They hadn't put any in there since the first of 1895. I don't think the engine was brought out but once during 1895. I never made any arrangement to have it brought out to fires after I knew the water company had cut off the water. It has always been customary for parties to take part in putting out fires; has been done 4 or 5 times I reckon. They were called out during the fires to help put them out. It is a fact that the fires were always put out before the engine got up steam. I mean to say that during the year 1895 the only fire protection the city of Dawson had or expected to have was that old fire engine that wasn't used during the year at all; and didn't have an engineer to run it. And those old cisterns that couldn't throw water until you had steamed up the engine. There used to be an arrangement for the water to run in those cisterns off the eaves of the stores. The water doesn't run off the stores now. The waterworks company have pumped the cisterns full with the hydrant. I think all of those cisterns are in working order to-day. I believe there are seven in all. There is one down there at the Variety works. I don't know what sort of condition it is in. As chairman of the fire company I haven't examined all of those cis

terns during the past year. I examined one of them last year. I haven't the one in front of Captain Fulton's. I don't think it is in the street. It is near the street. I think it is a fact that as chairman of the fire committee I never looked at it enough to see whether it is in the street or not. I can't say
645 whether it had any water in it last year or not. Our corporation limits run one mile each way, two miles wide. One of the cisterns is out of the town a little piece. I suppose it's got connection. I don't know whether it is true that its only supply was from a wind mill and that the wind mill has blown down. I don't know whether it got any other supply. There is one cistern right here in front of the buggy repository. I haven't examined that since last year. There is another right down here at the corner. I don't recollect, but suppose that I examined that last year. When I examined that the water was up to the coping, where it comes in. There is a pump down there to throw water into it. We didn't have anybody to run that pump last year. The pump is running nearly all the time. It is my understanding that the water from the pump ran into the cistern last year. I didn't say that the water ran into it at all. I know that is the way it is fixed. I didn't examine to see how the water got in there. There is another cistern near the old hotel. The water wasn't cut off from that that I know of. I don't think it is. I don't know where the water came from, but there is water in there. I didn't examine to see where the water came from. There is another down there near Captain Fulton's. I didn't examine that last year. There is another down at the Variety works. I didn't examine that last year. I don't know whether it is full or dry. There is another down on Lee street. That is the one where the wind mill is. The wind mill is not there now that I know of. I don't know how long since it was there. I could not tell whether there was any water in it last year. The cisterns I have mentioned are all.

646 Dr. J. G. DEAN, sworn on said occasion for the defendant, testified in substance as follows:

I was a member of the city council in 1894 and '95. I believe I became a member in Aug. '94. The action of the council in abandoning and repudiating the contract with the water works company was in good faith. I have studiously avoided authorizing anybody to use the water of the Dawson Waterworks Company since that time. I have not, as a member of the city council authorized anybody to use the water of the Dawson Waterworks Co. since 31st of December, 1894. The council has not done so that I know of in any of its public actions. The council has not recognized anybody as belonging to the fire department over which they had any control since that time. It recognized such persons as were accustomed to attending fires to the extent of giving them exemptions from street tax. I started I think to one or two of these fires in 1895. I went to Baldwin's after they had gotten it out, and if Mrs. Melton's was in 1895 I went out

there. I know there has been no organized fire company at the fire over there at Mrs. Melton's there running the hose. One citizen as much as another took hold and helped to put it out. I don't know who attached the hose to the hydrant. I did not as member of the city council authorize or consent to such a thing. I know that the Mechanics Fire Company down here at the Variety works is not an organized fire company so far as the town and council were connected with it. During the last year the council has bought 500 feet of hose to protect the city from fire. We expect that any citizen who got hold of it could use it. We expected them to get water out of the cisterns if they saw fit. We had an engine to give them the pressure. It belongs to the city council. It was no one's
647 duty to run that engine; any one that wanted to could do so. Could haul it out and put out the fires. We never made any arrangements to have any one there regularly to run the engine. We bought the hose. We knew that in previous years they had been getting water from the plugs. I remember on the occasion of the fire down here at the bakery, it was told in a general way that we no longer had anything to do with the water. I don't remember whether we told anybody that had a street tax exemption. I did not know that the council had the fire plugs put there for the purpose of putting out fires. I don't know whether these men that got the exemptions understood that the city was not to use the water. They had not always done it; they had gotten it out of the cisterns. I don't know whether they had since the waterworks were here. I know that since the waterworks were here they have usually gotten the water out of the plugs. I never notified them of any change in the arrangements, that they had no right to do it. Council itself never appointed anybody to do it. I don't know that the Mechanics Fire Co. ever had a meeting. I never tried specially to find out.

Defendant having put in evidence Dawson paper of November 7, 14, 21 and 28, 1894, calling for an election and the issuing of bonds, Mr. A. J. BALDWIN was recalled and testified in substance as follows: The vote for bonds was carried. Got a two-thirds vote. We sold $10,000 worth of the bonds; we are using it in the erection of the light plant. We had an offer for the balance and could have sold them. The reason that the bonds were not issued and a new waterworks plant erected, was because when there was a meeting here called for this purpose, it was decided that it would be better to wait
648 until the case was settled. I don't know that a great majority of the people here would not have voted for it except upon my promise that I would have this matter tested. I don't think that would have much to do with it. I don't know but what it takes as long to erect a system of waterworks as it does electric lights. It is as big a job. The districts that had no cisterns would have the same protection that they had before the waterworks were put in.

W. H. BISHOP, sworn for the defendant on said former occasion testified in substance as follows.

I was a member of the council in 1894. The repudiation and abandonment of the contract with the waterworks company was in good faith. I have not either directly or indirectly, authorized anybody to use the water of the waterworks company. I have never objected to anybody using it. I don't know that the council ever notified the fire department not to use it. I don't think there was a fire department. I don't recollect that the matter was brought up before us that every year and a committee appointed to confer with the fire department. I have never heard about there being a fire department that year. I don't know that there was any difference in 1895 from what there was in 1894 and previous years. I have lived in Dawson since 1862. I have seen them using the water in fire plugs before 1895. I don't know that they used it in 1895. I think there was some people exempted from street taxes that year. I don't recollect how many there were. Never notified any of those persons to get no more water from the water plugs. Don't know that they ever took any steps to run the engine after giving up the other water supply. Don't remember that we had any fires last year.

649 W. H. DAVIS, sworn for the defendant on said former occasion, testified in substance as follows:

I was a member of the council in 1894. I was present when the action was taken by the council in reference to the repudiation and abandonment of the contract with the Dawson Waterworks Co. That repudiation was in good faith. After that time I did not directly or indirectly authorize anybody to use the water. We didn't take any steps to prevent its being used except that the waterworks company was notified. After we did away with the waterworks company we had nothing but an engine. Don't know whether that engine was used in 1895 or not. It has been used once or twice at fires. We have paid $5. for having the engine carried there. The first person who carried the engine there we gave $5. to. Don't remember that we paid $5. last year. We didn't have any engineer in the employ of the city to run that engine last year. I don't remember whether there was any fire last year. We have had three fires within the last year or two. I never notified anybody that the water did not belong to the city any longer.

Mr. A. J. BALDWIN, being recalled to fix the dates of fires, it was agreed that there was only one fire in 1895, shown by the evidence which was at the bakery in February.

W. B. CHEATHAM, sworn for plaintiff on said former occasion testified in substance as follows:

I don't know the exact date of the last fire at the bakery. Dr. Farrar went to Atlanta in January, 1895, and this fire happened

after he left; not a great while afterwards. I was mayor of
650 Dawson in 1890. I drew up this contract prior to my last election. There was an election here on waterworks in 1886. It was held under Mr. W. R. Baldwin's administration. The reason why they didn't hold another election was because that election was called for waterworks, and I think the ballots read for or against waterworks and the question seemed to have been carried and was so declared by those holding the election in favor of waterworks.

Mr. HORSLEY, recalled by plaintiff on said former occasion, testified in substance as follows:
Locates bakery fire 18th or 19th of February, 1895.

J. G. PARKS, sworn for plaintiff on said former occasion testified in substance as follows:
Locates bakery fire in 1895.

W. B. CHEATHAM, recalled for plaintiff on said former occasion, testified in substance as follows:
I stated that I was mayor at the time of making this contract. I said that I made that contract under the election of 1886. That was the basis of the contract. The works were accepted by the mayor and council. They were satisfactory. They came up to the requirements of the contract. I think I continued mayor about 18 months after that time; they continued in operation all that time. The public ordinances were published; this ordinance was published. I have never seen the publication of any statute repealing that ordinance. I suppose if it had been my attention would have been called to it. I felt enough interest in it to notice it. I said yesterday I was not positive as to the date of the election. I meant that I knew it at the time but it had passed out of my mind.
651 There was an action of the mayor and council about it; I suppose you will find it on the minutes. That election was the basis upon which the contract was closed.

Cross-examined:

Q. Any action of council about it?
A. Yes, sir.
Q. Where is that?
A. On the minutes I suppose.

It was admitted by the defendant that the bill for $2000 for 1895, now sued for, was presented and payment demanded.

C. DEUBLER, sworn for the plaintiff on said former occasion, testified in substance as follows:
I was a member of the city council of Dawson at the time this contract was made with the waterworks company. I helped to make that contract as such councilman. The waterworks company have

complied with their contract after the erection of the plant so far as I know.

It was admitted here that the test showed that the waterworks came up to the contract.

(Witness resumed:) I was chairman of the street committee when I was member of council. I was a member of the council in 1892 and 1893 and several years before that. I was in charge when the cisterns were built. Part of them were built after the election in 1886 and part before. I superintended the building of them. They cost $150 and $200 apiece. We had a large one and one not quite so large and two small ones. I am still a citizen of this town. I don't think the cisterns are kept in repair so they will hold water. The cistern on Lee street was supplied with water from Mr. Carver's wind-mill; but that was removed several years ago. Since this contract was turned down no provision has been made for supplying them with water that I know of. The cistern in
652 front of Mr. Fulton's store on Main street is not supplied unless you use the plug. There was no water kept in there last year. It won't hold water. The cistern down at the Variety works has been filled by the overflow but it leaks very badly and it is hard to keep water in it. There has been no general system of repairs on these cisterns last year that I know of. The apparatus and arrangement for supplying the Variety Works cistern was left there after the waterworks was put up. There was a pipe run up to the tank that they used there. I think the council based their action in making this contract on the election . 1886. The fire engine has not been brought out at recent fires. I am the engineer of that engine. I have had no notification that I was hereafter to get water from the cisterns with the engine; I had no notification of any kind. I have not as an engineer had any notice of the change in the waterworks. I don't know the date but I heard that there was litigation between the city and the waterworks company in 1894. I knew that council refused to abide by the contract. I heard that they had refused to make water rates. At the time we built these cisterns we also built the hose tower to dry the hose in. The hose tower was built a year after by a different council. I think the two cost $250. We bought 600 feet of hose that same year. I think the hose cost 70 cents per foot; they knocked off for their travelling man. That was the same council that entered into this contract.

H. D. Hodge, sworn for plaintiff on said former occasion, testified in substance as follows:

I am secretary of the Dawson Waterworks Company. I was one of the incorporators of the company. I was connected with
653 the building of the system from the time the contract was entered into. This system would not have been entered into

but for the making of this contract. The waterworks system cost $40,000.

It was admitted that after the resolution of council, which appears on the minutes of June 27, 1894, was adopted, the city continued to use the water for the balance of the year, 1894, and later paid plaintiff for the same at the contract price.

Plaintiff also introduced on same trial, J. A. HORSLEY, who testified in substance as follows:

I am superintendent of the Dawson Waterworks Company. Have been since the waterworks were put in in 1891. Our water for fire protection has been used ever since they were put in. They are still used to put out fires at the present day. I live here. The water for fire protection has been furnished by the company ever since the waterworks have been in. It is still used in putting out fires. Used every year and up to the present time. The city has been using the water here at fires in this city ever since the waterworks were erected.

Upon cross-examination the defendant propounded the following question:

Q. Do you know what the character of the pressure of the waterworks or the character of the stream thrown or attempted to be thrown on Lee street this year?

(Objected to by plaintiff's counsel and objection sustained).

Witness resumed: The water is pumped into the standpipe. The weight of the water from the standpipe to the ground fixes the pressure of the stream. I was superintendent in 1895. I think
654 the pressure in 1895 was sufficient to throw a stream at all times on the principal streets of the city of Dawson fifty feet high. I don't remember a conversation with Mr. A. J. Baldwin in 1895, in which conversation he called my attention to the low pressure of the water; that it would not run out of a faucet in the second story of his building on Main street. I remember that once or twice in dry weather the customers turned their water on at night, and that run the pressure down. I won't be positive but I think that occurred once or twice. The standpipe was full and during the night the customers turned the water on and that run the pressure down. That has occurred more than once. I don't remember what year, but it was during the dry season. I think I can refer to a memorandum and tell you. It was not in 1895. I think it was in 1896.

Counsel for the defendant then said to the court: We propose to show that the waterworks were in the same condiction, the same waterworks, in 1894, 1895, 1896 and 1897, with no change in the condition.

By the COURT: I will permit you to show a failure to keep the contract and a failure to keep the pressure in 1895 and in no other year.

By COUNSEL FOR THE DEFENDANT: You will not permit us to show any failure before or since 1895 with the condition the same?

By the COURT: I will allow you to show that the pressure was not right in that year. I will not allow you to show what the pressure was in 1894 or 1896.

By COUNSEL FOR THE DEFENDANT: You will not permit us to show as a circumstance in 1894 what the pressure was in 1895?

By the COURT: No.

655 Cross-examination:

People hold their rent contracts and pay for the water for two hours a day. The city is not responsible for them. I suppose that it is a matter between the waterworks and each individual citizen whether they use much or little water. The pressure staid down only for a short time. It takes about an hour and a half or two hours to fill the standpipe. There was no way to prevent the people using the water. That was a violation of their contract. I did my best. I went around at night and asked them not to do it. I don't know that that happened in 1895. That was not in 1895; I think in 1896.

Q. You say that the water was used in 1896, 1897 and 1898; who used it?

A. The fire department.

Cross-question:

Q. You say the pressure was run down only a short time; you cannot tell how long?

A. I usually find out as soon as I rise in the morning.

Q. You don't know how long it has been down in the night?

A. I can approximate it by calculation. I kept the tank full all the time in 1895. I could have kept the pressure up every day and run all the time. If I had kept the pumps running during the night while our customers were taking away the pressure I could have kept the pressure up by running the pumps at night. I run the pumps at night during the dry season. I don't remember that it run down in 1895.

Question on re-cross:

Q. There has been no change in the waterworks in 1895?

Counsel for plaintiff objected because whether or not there was a change sheds no light.

By the COURT: I do not see any connection.

COUNSEL FOR THE DEFENDANT: The court has held that we can-

not show anything before or since 1895 that would throw any light on what happened in 1895.

656 By the COURT: If you will explain to me how that will throw any light on the question.

By COUNSEL FOR DEFENDANT: I propose to ask him if there has been any change in the standpipe before or since 1895.

By the COURT: How can that throw any light?

By COUNSEL FOR DEFENDANT: I expect to get at it in this way, if there had been no change before or since or during 1895 in the standpipe or mains or pipes on the principal streets of the city, then if before or since 1895 the pressure had not been sufficient, it would be relevant to show that it was not sufficient in 1895.

By the COURT: If you propose to show a defect by him, I will allow you to show it.

Witness then resumed:

Q. College street is one of the principal streets, is it not?

A. Yes, sir; I think it is.

Q. The main on College street is the same main that was put there when the waterworks was first erected?

A. Yes, sir.

Q. What size is it?

A. Four inch.

Q. Have you ever tested that main to see whether or not you could get a pressure?

A. I think we tested it last summer.

Q. Did you make the test in connection with Mr. Baldwin?

A. Yes, sir, several went out there during the time.

Q. What did you find?

Objection by counsel for plaintiff because a test in 1897 would not show a defect in 1895.

By COUNSEL FOR DEFENDANT: We propose to show that the mains laid on the streets were not large enough to throw a stream of water according to contract and we did not know of it until a fire happened on that street and then is when a test was made.

657 By the COURT: There are no pleadings of that kind in this case and I will not allow that evidence.

Witness resumed: We kept the tank full all the time to the best of my knowledge. We have been pumping all the time. We run the pumps until night and as long as necessary to keep the tank full in 1895. We run now during the day. We keep up steam all the time during the dry season. I don't know whether there was a dry season in 1895 or not. We keep up in the dry season and not in the wet because people use more water in the dry season. From the time we stop the day before until the next morning the pressure is not necessarily going down. We never had as many subscribers that year as we have now. When we saw the pressure going down we fired up. I don't know whether we had the same pressure on all

the time during 1895. We tried to keep it up to the standard all the time. During the night the sprinklers were turned on and run the pressure down. I said I didn't remember the pressure going down in 1895.

Here defendant offered amended plea, which was allowed by the court.

Q. Has there been any changes in the mains of the city of Dawson or tanks since the waterworks were erected, except necessary repairs on the same?

A. No.

Q. Have they been kept in good repair?

By the COURT: I won't allow you to show whether or not it has been kept in repair since 1895.

Q. What was the condition in 1895; was if good?

A. Yes so far as repairs were concerned. I have had no experience with testing the power or capacity of a four-inch main with the pressure afforded by a tank as high as the tank in the city
658 of Dawson. I have never had any experience of that kind. I was at the test made on College avenue. The mains in the city of Dawson are from these waterworks.

Q. What sort of a stream did that throw?

Objected to because witness said it occurred in 1897. Any condition or test made in 1897 does not throw any light on the condition in 1895.

By the COURT: You propose to show that in 1897 you made a test of a four inch main from a standpipe and the volume of water was as good as at anytime and that at that time it would not throw a stream of water 50 feet, and that was the first test of the main and no change since the waterworks put in?

By COUNSEL FOR DEFENDANT: That is about it.

By the COURT: I rule that you cannot show any test made in 1897.

Counsel for defendant offered the minutes of the city council for July 18, 1886, for the purpose of showing that council did comply with the authority of the election of 1886.

Counsel for plaintiff objected and the court rejected said minutes.

Counsel for defendant then offered the minutes of 18th of July, 1886, to show several offers made by that council finally resulting in their having built a number of cisterns, which were constructed by that council as a compliance with whatever authority they had by virtue of that election in 1886; said minutes offered in evidence being briefed as follows:

In regard to the question of waterworks Alderman Lowrey sub-
mitted two plans: first to put a ram in the creek and force
659 water into the town. 2nd, to confer with Central railroad to build a well, giving 1000 dollars on part of the town. A

communication was read from parties in Thomasville in regard to plan suggested for waterworks. Messrs. Lowrey, Melton and Wood were appointed as a committee to confer with the fire company in regard to waterworks and devise some plan to furnish water without too much expense. In regard to building a tower for engine hose, the same was referred to the finance committee for action.

By the COURT: If you propose to show they adopted the system I will allow it.

COUNSEL FOR DEFENDANT: We simply propose to show this authority by the council. We propose to show that those cisterns were built by that council.

By the COURT: I have already ruled twice. That evidence is rejected.

A. J. BALDWIN, re-introduced by the defendant, testified in substance as follows:

I don't know how many times the city of Dawson used the water of the waterworks company in 1895. I don't remember the year of the bakery fire positively.

Q. Was that the only time water used by the city of Dawson during 1895 of the waterworks?

A. I don't know that it was or not.

Q. What was that water reasonably worth?

Objected to by plaintiff and objection sustained.

Q. What is a reasonable amount, Mr. Baldwin, for the protection afforded?

Objected to by plaintiff and objection sustained, the court saying the contract fixes that.

The defendant also proposed to ask Mr. Baldwin and other
660 witnesses the same question that had been propounded to Mr. Horsley to show a failure of consideration, and the court disallowed the same on the ground that the testimony sought to be elicited was irrelevant.

After argument had the court directed the jury to find a verdict for the plaintiff for the sum of $2,000, besides interest and costs of suit, and the jury so found upon said direction of the court, and without further instructions, and without any consideration whatsoever of the evidence submitted, the said verdict being signed by R. E. L. Hammond, as foreman, and dated July 5th, 1898.

Counsel for plaintiff on the succeeding day entered up a judgment upon said verdict against the city council of Dawson, the said judgment being signed by the plaintiff's counsel as well as by the judge presiding, the Honorable H. C. Sheffield.

The defendant, The City Council of Dawson, then and there excepted to the ruling of the judge in so directing said verdict and in so entering up said judgment, as well as to the various rulings as hereinbefore set forth; and the defendant now comes within thirty

days since the direction of said verdict and within thirty days since the rendition of said judgment, and within thirty days since the adjournment of said court, and tenders this his bill of exceptions, and makes the following assignments of error:

1. The court erred in not allowing the defendant to prove by plaintiff's witness Horsley the character of the pressure in 1898.

2. The court erred in refusing to allow the defendant to prove by said Horsley the failure of the pressure any year except the year 1895.

661 3. The court erred in refusing to allow the defendant to prove by said witness that there had been no change in the standpipe before or during or since the year 1895.

4. The court erred in refusing to allow the defendant to prove by said Horsley after the amended plea had been allowed and filed that the system had been kept in repair since the year 1895.

5. The court erred in refusing to allow the defendant to prove by said Horsley that a test was made of said pressure in 1897 and that the pressure failed.

6. The court erred in refusing to allow the defendant to prove by said Horsley that any other tests had been made during that year.

7. The defendant proposed to show that in 1897 they made a test of one of the four inch mains with the standpipe and head and volume of water they had on, and that they were in good condition and repair, and that in 1897 it would not throw water fifty feet high, and that there had been no change since the waterworks were first put up; defendant offering to make said proof by plaintiff's witness Horsley. The court refused to allow such proof and erred in such refusal.

8. The court erred in not allowing the defendant to prove by A. J. Baldwin and other witnesses what the defendant had proposed to prove by the witness Horsley.

9. The court erred in directing the jury to find a verdict for the plaintiff for $2000, besides interests and costs, because the defendant says that there was not sufficient evidence introduced in said case to require such a verdict or to authorize such a direction.

10. The court erred in entering up said judgment upon said verdict and in allowing the counsel for plaintiff to do so.

662 11. The court erred in directing said verdict because the defendant says that there was not sufficient evidence to support such a verdict.

12. That the court erred in directing said verdict because under the law as applicable to the facts shown by the evidence in the case the contract sued on by the plaintiff was null and void because there had not been a sufficient compliance on the part of the City of Dawson with the constitution and laws of this State to enable the said City of Dawson to make the alleged contract.

13. That the court erred in directing said verdict, because there was no evidence to show any liability on the part of the defendant in said case by means of any contract express or implied.

14. That the court erred in directing said verdict because there was not sufficient proof of the value of the services claimed to have been rendered by the plaintiff in the furnishing of water and fire protection, or any proof at all to fix the amount of compensation to which the plaintiff was entitled for said water and protection.

15. That the court erred in directing said verdict because there was no proof that the defendant had received during the year 1895 any adequate consideration for the sum of $2000. the amount of the principal of said verdict.

16. That the court erred in ruling that the alleged contract fixed the amount of the liability of the said city council for the year 1895, when under the law and evidence in the case as contended by the defendant the said alleged contract was void.

17. That the court erred in directing the said verdict because the proof failed to show that the defendant in any way became
663 liable to the plaintiff in any amount whatsoever on account of any lawful contract entered into on account of any consideration received by the defendant, or on account of any services performed, or thing of value furnished by the plaintiff to the defendant during the said year of 1895.

18. The defendant says that the court erred in directing said verdict because the defendant says that under the pleadings in said case, and under the law applicable thereto and the evidence that had been introduced on the issues made on the validity of the alleged contract, the good faith of the plaintiff and of the defendant, the value of the water furnished and the fire protection afforded, the equity and fairness of the charge of $2000 per annum as set forth in said contract, were in dispute before the court and jury, and the court had no legal power under the constitution and laws of this State in such a case to direct a verdict.

19. This being an action against the city council of Dawson for a year's supply of water in which the plaintiff's right to recover depended upon the validity of the contract between it and the defendant covering a period of years, and the evidence not affirmatively disclosing (as contended by the defendant), that when the contract was originally made the defendant had in the manner prescribed by the constitution of this State made due and lawful provision for the payment of the yearly sums to become due on said contract, it was error to direct a verdict for the plaintiff.

20. The court erred in holding that the following section of the ordinances embodying the contract sued on made due and lawful provision for the payment of the yearly sums to become due on said contract as prescribed by the constitution of this State, the said section being all the evidence introduced by the plaintiff to
664 show such compliance, and being in the words following:

"Section 237. The council shall and they are hereby required to make provision each year for the payment of $2000. as provided in the foregoing section by levying a tax sufficient for that

purpose upon the taxable property of the city." The foregoing section being section 236 briefed in this bill of exceptions.

21. The court erred in directing said verdict, because this defendant says that there was no evidence introduced in said case by which it affirmatively appeared that the debt sued on had been incurred by the defendant with the assent of two thirds of the qualified voters of the city of Dawson at an election for the purpose of declaring such assent, held as prescribed by law.

22. The court erred in directing said verdict because the court in such a suit on such a cause of action had no legal power to so direct.

The defendant, The City Council of Dawson, hereby specifies the following portions of the record in the case as being material to a clear understanding of the errors complained of:

1st. The original petition on behalf of the Dawson Eater Works Company against said defendant.

2nd. The original plea of this defendant filed in office in November, 1896.

3rd. The amended plea of this defendant filed in said case on November 23, 1896.

4th. The amended plea of this defendant filed in said case on July 5, 1898, together with the order thereon of the said court allowing the same and ordering it filed.

5th. The verdict in said case found, as alleged, under the
665 direction of the court and signed by R. E. L. Hammond, foreman, July 5, 1898.

6th. The judgment of the court entered in said case and signed by the presiding judge and the attorneys for plaintiff on July 6, 1898.

And the said defendant, The City Council of Dawson, now prays that this bill of exceptions be certified as true, and that the same, together with portions of the record herein specified, be duly sent up to the supreme court, as the law in such cases has made and provided, that the errors alleged to have been committed may be reviewed and corrected.

GUERRY & HALL,
M. C. EDWARDS,
J. A. LAING, *Dawson, Ga.*,
GUERRY & HALL, *Macon, Ga,*
Att'ys for Pl'ff in Error.

I do certify that the foregoing bill of exceptions is true and contains all of the evidence and specifies all of the record material to a clear understanding of the error complained; and the clerk of the superior court of Terrell county is hereby ordered to make out a complete copy of such parts of the record in said case as are in this bill of exceptions specified, and certify the same as such, and cause the same to be transmitted to the next October term of the supreme

court, that the errors alleged to have been committed may be considered and corrected.

This August 3rd, 1898.

H. C. SHEFFIELD,
J. S. C., P. C.

Due and legal service of the within and foregoing bill of exceptions and writ of error is hereby acknowledged.

This August 3rd, 1898.

HALL & WIMBERLY, *Macon, Ga.*,
J. G. PARKS, *Dawson, Ga.*,
Attorneys for Defendant in Error.

666 Filed in office, August 9, '98.

W. S. DOZIER, *Clerk.*

Clerk's office, superior court, Terrell county.

DAWSON, GA., *3rd Day of Sept.*, 1898.

I hereby certify that the foregoing is the true original bill of exceptions filed in this office in the case of Dawson Waterworks Company against The City Council of Dawson therein referred to, and that a copy thereof has been made and is now of file in this office.

Witness my signature and the seal of said court hereto affixed this the day and year above written.

[SEAL.] W. S. DOZIER, *Clerk.*

GEORGIA,
Terrell County.

I hereby certify that a supersedeas bond in the above and foregoing case has been duly filed and all costs paid.

Given under my hand and official signature. This Aug. 9th, 1898.

W. S. DOZIER, *Clerk S. C.*

Filed in office Sept. 9th, 1898.

LOGAN BLECKLEY,
D. C. S. C., Ga.

STATE OF GEORGIA,
Terrell County.

To the superior court of said county:

1. The petition of the Dawson Waterworks Company, a corporation under the laws of the State of Georgia, respectfully showeth: That the city council of Dawson, a municipal corporation exercising the corporate authority and powers of and over the city of Dawson

in said county, under the laws of said State, composed of a
667 mayor and six aldermen, (A. J. Baldwin being the said mayor, and R. L. Melton, B. L. Rainey, John S. Lowrey, J. G. Dean, W. H. Bishop and W. H. Davis the aldermen), is indebted to your petitioner in the principal sum of two thousand dollars.

2. For that your petitioner during the year 1895 furnished to the said city of Dawson, exercising its corporate rights and powers under said name and style of the city council of Dawson, the free and unrestricted use of such water as needed from time to time in case of fire, and likewise furnished during the whole of said year 1895 to said defendant, water for fire protection in said city, and fire plugs along the mains laid and owned and operated by petitioner, and the privilege and use of water to supply defendant's cisterns, at and for the agreed compensation of two thousand dollars per annum, to be paid petitioner by said defendant in that behalf.

3. Said agreed annual compensation was by the terms of defendant's agreements and undertakings to be paid your petitioner by said defendant in semi-annual payments of one thousand dollars each, on the first day of July, 1895, and the first day of January, 1896.

4. And thereupon it came and was defendant's duty to pay your petitioner the sum of one thousand dollars on the first day of July, 1895, and the further sum of one thousand dollars additional on the first day of January, 1896, and defendant at said date became on said date indebted to your petitioner in said sums, and said sums became on said dates due and payable by defendant to your petitioner.

5. Your petitioner shows that the said defendant did not, nor would, on said 1st July, 1895, or thereafter pay your peti-
668 tioner said sum of one thousand dollars so due as aforesaid, and did not, nor would on said January 1st, 1896 or thereafter pay your petitioner said aggregated sum of two thousand dollars, besides interest so due on said last named date as aforesaid, but wholly failed and refused, and has hitherto wholly failed and refused to pay your petitioner said debt, or any part or parcel thereof, leaving still due and owing to your petitioner by said defendant the sum of two thousand dollars besides interest, which said defendant has refused to pay and still refuses to pay, and therefore petitioner brings its suit.

6. Your petitioner shows that your petitioner has furnished the aforesaid water, and privilege of use of water, and the aforesaid protection against fire to said defendant, upon defendant's undertaking to pay your petitioner therefor said semi-annual payments, each of one thousand dollars, on said July 1st, 1895 and January 1st, 1896, and in consideration of defendant's said undertaking and promise in that behalf.

7. Your petitioner shows that defendant's said undertaking is fully set forth in a written contract made by said defendant with petitioner's predecessors, R. L. Bennett and his associates, and their successors and assigns, said contract being confirmed at the regular

meeting of the said city council of Dawson, February 21st, 1890. Said contract is found embodied and correctly set forth in the code of the city of Dawson duly published by authority of said defendant in the year 1892, said contract forming chapter 23, article 10, of said code, and occupying pages 73, 74, 75, and 76 therein. Petitioner shows that said contract is lengthy and would be expensive and inconvenient to attach hereto, and petitioner prays leave to
669 produce the same on the hearing, and that the same may be considered sufficiently embodied herein by reference thereto without requiring petitioner to attach same by copy.

8. Petitioner shows that by said contract said Bennett and his associates and successors were to be incorporated, and that said contract was to have the force and effect of a contract between such corporation and said defendant as fully and completely as though drawn in that form and signed by said corporation.

9. Petitioner shows that such incorporation was had, your petitioner being said corporation so formed in pursuance of the provisions of said contract, and your petitioner at great expense has accepted and met all the obligations of said contract and has fully complied therewith.

10. Your petitioner attaches hereto a copy of the article of said contract which shows what your petitioner was to furnish said defendant at and for said price of two thousand dollars annually, said article being marked "Exhibit A," to which leave of reference is prayed.

11. Your petitioner has fully complied with said articles, as well as every other part of said contract, and has furnished all the service and water and fire protection, and all matters and things in due compliance with said contract, not only during said year of 1895, but during preceding years and up to the present time.

12. Your petitioner also attaches a copy of the article of said contract which specifies that petitioner was to furnish water to defendant's municipal buildings and two public fountains, at and for a compensation equal to and to be paid by a remission to petitioner by defendant of all license fees, taxes, dues and charges that
670 might become assessible by defendant against petitioner; said article being marked "Exhibit B," to which leave of reference is prayed.

13. Your petitioner has likewise furnished defendants the waters called for by the last mentioned article of the contract, and has thereby become entitled to the compensation called for by said article.

14. Your petitioner avers that the conduct of said defendant in refusing to pay the aforesaid debt was in bad faith; that said defendant has acted in bad faith and has been stubbornly litigious, and has caused your petitioner great and unnecessary expense; and by defendant's bad faith and said conduct in that behalf, your petitioner has incurred the expense of five hundred dollars for attorney's fees in and about the collection of said debt, and your petitioner

prays that it may be found and adjudged to have and recover of said defendant said sum of five hundred dollars for attorney's fees, in addition to said principal debt sued for, and lawful interest thereon with cost of suit.

Wherefore your petitioner prays that process may issue requiring said city council of Dawson and above named mayor and aldermen who now exercise its corporate functions to be and appear at the next term of Terrell superior court to answer your petitioner's complaint.

STEED & WIMBERLY,
HOYL & PARKS,
Pl'ff's Att'ys.

EXHIBIT A.

SEC. 236. The City of Dawson, in consideration of said company guaranteeing to it for the period of twenty years, and as long thereafter as the said company, its successors and assigns, shall continue to operate water works, a free and unrestricted use of its water
671 in case of fire and for protection against conflagration, and agreeing to establish at convenient places along the line of its mains, fire plugs of approved patterns, not to exceed fifty in all, until the corporate limits of said city are extended and population of said city increases so that there are five hundred persons living in said extension, after which they shall be increased proportionately if required, and as an additional fire protection also to furnish water to fill the present public cisterns if needed, said water to be used exclusively for fire purposes only, and the said water to remain the property of said company except in case of fire, hereby obligates itself to pay said company or to such trust company as the Dawson waterworks may elect or decide upon as their trustee for their bonds, the sum of two thousand dollars annually for twenty years, in semi-annual payments of one thousand dollars each, on the first day of January and July of each year.

EXHIBIT B.

SECTION 239. That in consideration of the said company agreeing to furnish to the public municipal buildings, and further agreeing to furnish water to two public fountains of $\frac{1}{8}$ inch nozzle each, the City of Dawson hereby obligates itself to remit to said company, its successors and assigns, any and all license fees, taxes, dues and charges which may at any time hereafter be levied or assessed by said city against said company, or upon the plant to be used in said waterworks system.

672 STATE OF GEORGIA, }
Terrell County. }

To the sheriff of said county, Greeting:

DAWSON WATERWORKS CO.
v.
A. J. BALDWIN, Mayor; R. L. MELTON, E. L. RAINEY, J. S. Lowrey, J. G. Dean, W. H. Bishop, and W. H. Davis, Aldermen. } Complaint.

The defendant- A. J. Baldwin, mayor, *et al.*, are hereby required, personally or by attorney, to be and appear at the next superior court to be held in and for said county on the third Monday in May next, then and there to answer the plaintiff's demand in an action of complaint.

Witness the Honorable H. C. Sheffield, judge of said court, this 28th day of April, 1896.

W. S. DOZIER, *Clerk.*

Filed in office April 28th, 1896.

W. S. DOZIER, *Clerk.*

GEORGIA, }
Terrell County. }

I have this day served the defendants of the within suit each personally with a copy of the within writ.
This May 2nd, 1896.

D. K. CHRISTIE, *Sheriff.*

We, the jury find for the plaintiff, The Dawson Waterworks Company, the sum of two thousand dollars principal, besides interest and costs of suit.

Nov. 25th, 1896.

J. A. JORDAN, *Foreman.*

DAWSON WATERWORKS COMPANY
v.
THE CITY COUNCIL OF DAWSON. } Complaint in Terrell Superior Court and Verdict for Plaintiff. November Term, 1896.

Whereupon it is considered, ordered and adjudged by the court that the plaintiff, The Dawson Waterworks Company, do recover of the defendant, The City of Dawson, the sum of two thousand dollars

as principal, and one hundred and sixty dollars and ninety
673 six cents as interest, and — dollars and — cents as cost of suit, and the defendant be in mercy, etc. November 25, 1896.

Judgment signed.

H. C. SHEFFIELD,
J. S. C., P. C.

STEED & WIMBERLY,
HOYL & PARKS,
E. J. HART,
Pl'ff's Att'ys.

We, the jury, find for the plaintiff the sum of two thousand dollars principal, besides interest and cost of suit. July 5, 1898.

R. E. L. HAMMOND, *Foreman.*

DAWSON WATERWORKS CO. } Complaint in Terrell Superior
v. } Court. Verdict for Plaintiff.
THE CITY COUNCIL OF DAWSON. } May Term, 1898.

Where upon it is considered, ordered and adjudged by the court that the plaintiff, The Dawson Waterworks Co., do recover of the defendant, The City Council of Dawson, the sum of $2,000 as principal, and $386.94 as interest to this date, and — dollars and — cents as costs of suit, and the defendant be in mercy, etc.

Judgement signed July 6, 1898.

H. C. SHEFFIELD,
J. S. C. P. C.

STEED & WIMBERLY,
J. G. PARKS, &
E. J. HART,
Pl'ff's Att'ys.

DAWSON WATERWORKS CO. } Complaint in Terrel Superior Court.
v. } May Term, 1898.
CITY COUNCIL OF DAWSON. }

Now comes the City Council of Dawson and in answer to the petition filed in above stated case say-:

1. The paragraph 1 of plaintiff's petition is not true.

674 2. In answer to the second par. defendant say- it is not true, that plaintiffs furnished water to the city for the year 1895, for the reason that the city did not use any water during said year, and had on Dec. 14, 1894 formally notified plaintiff that *they* would no longer be bound by said contract and would not use the water.

3. The defendant admits the truth of 3 paragraph.

4. Defendant denies the truth of the 4th paragraph.

5. In answer to the 5 defendant says *they* did refuse to pay said sum because *they* were not liable therefor.

6. In answer to the 6 paragraph defendant say- it is not true that any water was furnished to *them* during the year 1895.

7. Defendant admits the seventh paragraph to be true.

8. Defendant admits the truth of the 8th paragraph.

9. Defendant ask- that plaintiff be put upon proof as to the truth of the ninth paragraph.

12. Defendant admits the 12 paragraph.

13. Defendant denies the 13th and 14th paragraphs.

14. Defendant say- that plaintiff ought not to recover against *them* for the following reasons:

1st. That said suit is brought to enforce a contract made and entered into with a former mayor and council of Dawson for a supply of water at the price of $2,000 per annum and to run for 20 years, thus creating a debt against the city of $40,000, and this defendant says was created without authority of the law, and that said defendant city is not liable therefor. That on December 14, 1894, this defendant gave plaintiff formal notice that *they* would no longer be bound by said contract; would no longer use the water; and this defendant did not thereafter use *their* water. That no election was held to authorize the creation of said debt and the city of Dawson is not liable therefor. That said contract was and is not a fair
675 and equitable contract. That the city could have done much better, and could have saved an immense amount; and that said price is far in excess of the true value of said waterworks. That the sum of $20,000 would be a fair price for the erection or purchase of such a system of waterworks as was put in by plaintiff, The Dawson Waterworks Company. That the system of waterworks erected by said waterworks company is not such as was contracted for by and between *them* and said city. That it is wholly inadequate in time of fire, the only time in which the city needs is defective, and not up to the terms of the contract. The pressure is not such as the contract required, and the main pipe that furnishes water in time of fire is not kept clean and open so as to be successfully used in time of fire. Also that the water is not good and fit for the uses intended under the contract.

15. Defendants say- that plaintiff is indebted to defendant in the sum of $460. for taxes due the city for 1895, which amount *they* pray- to be allowed as a set off against plaintiff's demands.

J. H. GUERRY,
J. M. GRIGGS,
J. A. LAING, &
M. C. EDWARDS, JR.,
Att'ys for Defendants.

Filed in office Nov. 23, 1896.

W. S. DOZIER, *Clk.*

DAWSON WATERWORKS CO.
v.
THE MAYOR & CITY COUNCIL OF DAWSON. } Complaint in Terrell Superior Court. November Term, 1896.

And now comes the defendant and in answer to the complaint, amends *his* answer heretofore filed and says that plaintiff ought not to further have and maintain *his* said action, because said suit is brought to enforce a contract made and entered into with a
676 former mayor and council of Dawson for a supply of water at the price of $2,000 per annum and to run for twenty years, thus creating a debt against the city of $40,000, and this defendant says that said debt was created without authority of law, and that said city defendant is not liable therefor. That on the 14th of December, 1894, this defendant gave plaintiff formal notice that *they* would no longer be bound by said contract and would no longer use the water, and this defendant did not thereafter use said water. That no election was held to authorize the creation of said debt, and the city is not liable therefor.

J. M. GRIGGS,
J. H. GUERRY,
J. A. LAING,
Def't's Att'ys.

Filed in office November 23, 1896.

W. S. DOZIER, *Clerk.*

DAWSON WATERWORKS COMPANY
v.
MAYOR & CITY COUNCIL OF DAWSON. } Complaint in Terrell Superior Court.

And comes the defendants and by leave of court move to amend *their* plea heretofore filed in the above stated case, and for amendment thereto says:

1. That the consideration for the claim of the plaintiff sued upon has wholly failed, in that the pressure which said plaintiff contracted and agreed to furnish under the contract sued upon is not sufficient to throw a stream of water as high as the said plaintiff agreed in *their* contract that it should be thrown, and was not sufficient during the year 1895 to throw said stream of water, to-wit, fifty feet vertically in still air.

2. That the mains on several of the principal streets in said city of Dawson, of the system of waterworks of said plaintiff are
677 only 4 inches in diameter, and were originally put in of the said dimension, and there has been no change in the size of said main pipes, nor in the size or height of the tank or standpipe of said system of waterworks since their original construction.

3. That with *their* present system of waterworks in Dawson, Ga., and the size of mains and the height of tank, the plaintiff never *have*

been able to comply with *their* contract to throw water as high as agreed by plaintiff that *they* would throw water from *their* plugs for fire purposes on all the principal streets of Dawson. *They* did not comply with said agreement to throw water a specified height as stated in *their* contract during the year 1895.

J. H. GUERRY,
J. M. GRIGGS,
J. A. LAING,
M. C. EDWARDS, JR.,
Def't's Att'ys.

Upon considering the foregoing amendment it is ordered that the same be and is hereby allowed and ordered filed.
This July 5th, 1898.

H. C. SHEFFIELD,
J. S. C., P. C.

Filed in office July 5, 1898.

W. S. DOZIER, *Clerk.*

DAWSON WATERWORKS CO.
v.
CITY COUNCIL OF DAWSON. } Complaint.

The following jurors were empannelled to try the above stated case: J. H. Speer, W. D. Qualls, C. S. Lee, Zack Goss, R. S. Peak, Alex. Helton, A. B. Lay, R. E. L. Hammond, J. H. Smith, A. G. Mulholland, J. S. Spear and W. B. Dismukes, and returned the following verdict:

We, the jury, find for the plaintiff the sum of $2,000 principal, besides interest and costs of suit.
July 5th, 1898.

R. E. L. HAMMOND, *Foreman.*

678 Whereupon it is considered, ordered and adjudged by the court that the plaintiff, The Dawson Waterworks Co. do recover of the defendant, The City Council of Dawson, the sum of two thousand dollars as principal, and three hundred and eighty-six dollars and ninety-four cents as interest to this date, and — dollars and — cents as cost of suit, and the defendant be in mercy, etc.
Judgment signed July 6, 1898.

H. C. SHEFFIELD,
J. S. C., P. C.

STEED & WIMBERLY,
J. G. PARKS, &
E. J. HART, *Pl'ff's Att'ys.*

STATE OF GEORGIA, }
Terrell County. }

Terrell Superior Court.

I hereby certify that the foregoing 11 pages hereto attached contain a true and complete transcript of such parts of the record in the case Dawson Waterworks Co. *v.* The City Council of Dawson in said court as are specified in the bill of exceptions and required by the order of the presiding judge to be sent to the supreme court.

In testimony whereof I have hereunto set my hand and affixed my seal of office at —— this the 3rd day of Sept. 1898.

W. S. DOZIER, *Clerk.* [SEAL.]

Filed in office 9 day of September, 1898.

LOGAN BLECKLEY,
D. C. S. C., Ga.

Clerk's office, supreme court of Georgia.

ATLANTA, GA., *May* 20, 1899.

I hereby certify that the foregoing pages hereto attached contain true and complete copies of the original bill of exceptions and of the transcript of the record of file in this office in the case of The
679 City Council of Dawson, pl'ff in error *vs.* The Dawson Waterworks Company def't in error.

Witness my signature and the seal of supreme court of Ga. hereto affixed the day and year above written.

[Seal Supreme Court of the State of Georgia.]

Z. D. HARRISON,
Clk S. C., Ga.

Ten cents revenue stamp (cancelled.)

680 *Opinion Supreme Court of Georgia.*

By the court, per COBB, *Justice:*

1. Without the preliminary sanction of a popular vote as required by the constitution, a municipal corporation cannot contract for a supply of water on the credit of the city, for a longer period than one year, and a contract which by its terms is to run for twenty years, each year's supply to be paid for semi-annually from year to year, is operative from year to year so long as neither party renounces or repudiates it.

(*a.*) Cartersville Improvement Co. *v.* Cartersville, 89 Ga. 683; Car-

tersville Water Company *v.* Cartersville, 89 Ga. 689; Lewis *v.* Lofley, 92 Ga. 804; Habersham County *v.* Porter Mfg. Co., 103 Ga. 613, followed and approved. Spann *v.* Webster County, 64 Ga. 498; Cabaniss *v.* Hill, 74 Ga. 845, overruled in part.

2. Is it not absolutely essential to the validity of an election held under that provision of the constitution of this State which declares that, "No * * * municipality * * * shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of the taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law," that there should be an act of the General Assembly prescribing the manner of such election?

3. The manner of holding such election, where the debt to be incurred is a bonded debt, is prescribed in section 377 *et seq.* of the Political Code.

681 4. There is no general law of this State prescribing the manner of holding elections where the debt proposed to be incurred is not a bonded indebtedness; nor is there any local law expressly authorizing the city council of Dawson to prescribe the method of holding such election.

5. Even if no legislation is necessary to authorize a municipal corporation to hold an election to determine whether a debt other than a bonded indebtedness shall be incurred, an election held pursuant to an ordinance and notice which does not state the amount of the debt to be incurred will not be sufficient to authorize the execution of a contract incurring an indebtedness.

6. Where one enters with a municipal corporation into a contract which is void because opposed to the constitution and laws of this State and contrary to its settled public policy, complete performance of such contract on the part of such person will not prevent the municipal corporation from pleading its want of power or the illegality of the contract.

7. There is nothing in the decision of this case when it was here before in conflict with the rulings now made.

8. The city council of Dawson has a right to make a contract to supply the city with water for one year, provided they have in the treasury of the city a sum sufficient to pay therefor which may be lawfully appropriated for that purpose, or if such sum can be secured by lawful taxation levied during the year in which the contract is made. While a contract for a longer space of time is illegal, yet where the other parties to such a contract have complied with their part by erecting a plant at great expense in order to furnish the city with water, the city is liable for the amount
682 stipulated in the contract for each year that it received the benefits thereof.

9. The evidence being conflicting as to whether, during the year for which compensation is claimed by the water company for water

furnished to the city, the latter received the benefit to be derived under the contract in such a way as to make it liable to pay the annual rental stipulated therein, the case should have been submitted to a jury under proper instructions, and it was error to direct a verdict for the plaintiff.

COBB, *J.*:

The Dawson Waterworks Company brought suit against the City Council of Dawson, claiming that the defendant was indebted to it in the sum of $2,000 besides interest for water furnished during the year 1895 for the purpose of protecting the inhabitants of the city against fire. At the trial there was introduced in evidence an extract from the minutes of the city council of the proceedings at a meeting held on May 10, 1886, which was as follows: "A motion was made and carried that the question of incurring expense of waterworks be submitted to the citizens of the city, and that notice of an election be run in the Dawson Journal for the time prescribed by law, and that an election be held on said question on the 11th day of June, 1886." There *was* also in evidence four issues of the Dawson Journal, the official gazette of the city and county, for the four weeks preceding June 11, 1886, to-wit: the issues of May 13, 20, 27 and June 3, respectively, showing the election notice which was as follows:

"*Election Notice.*

Notice is hereby given that there will be an election held in the city of Dawson on the 11th day of June, 1886, to determine
683 whether the city of Dawson shall incur the expense of waterworks."

It was admitted that at the election held pursuant to this notice more than two-thirds of the qualified voters of the city voted in favor of incurring the expense of waterworks. It was also admitted that the value of the taxable property of the city of Dawson in 1886 and each succeeding year was over one million dollars. The contract relied upon by the plaintiff, which was in the form of an ordinance appearing in the book of ordinances the city of Dawson, was introduced in evidence. The material parts of this contract are as follows:

"SECTION 231. Grants to R. L. Bennett of Philadelphia, Pennsylvania, his associates, their successors and assigns, who are to organize a company to be styled the Dawson Water Works Company, the exclusive right and privilege for a period of ninety-nine years to construct, maintain and operate a system of waterworks for supplying said city and its inhabitants, and for the protection against fire, and for domestic and sanitary and other purposes.

SECTION 232. Grants authority to lay pipes and mains in the

streets and avenues of said city as the same are now open or may be extended, to dig ditches and trenches in the streets.

SECTION 233. Right to erect buildings and tanks and lay pipes, erect other structures and make improvements on lands owned and controlled by the city, except public squares.

SECTION 234. The said company, its successors and assigns, to build and have in operation in eighteen months a complete and thorough system of waterworks, laying four and eight-tenth- miles of pipe, sizes 8, 6 and 4 inches in diameter, with reservoir of not less than 40,000 gallons capacity, and of sufficient height to
684 produce a pressure on the mains such that from any hydrant located in the principal streets a stream of water will be projected fifty feet vertically in still air, through one hundred feet of fire hose, with a one inch nozzle attached.

Said company or assigns from completion of system of waterworks until their charter shall cease shall be required to furnish a sufficient supply of water for the purposes before and hereafter mentioned, unless prevented by unavoidable and providential causes. In such an event they shall be allowed a reasonable time to make repairs, and if, after such reasonable time shall have been allowed, they should still fail to furnish said supply of water, their franchise from that fact shall be forfeited.

SECTION 235. The company to extend mains and pipes and enlarge plant of system generally to meet increasing demands from growth of city.

SECTION 236. The City of Dawson in consideration of said company guaranteeing to it, for the period of twenty years, and as long thereafter as the said company, its successors and assigns, shall continue to operate the waterworks, a free and unrestricted use of its water, in case of fire, and for protection against conflagration, and agreeing to establish at convenient places along the line of its mains fire plugs of approved pattern, not to exceed fifty in all, until the corporate limits of said city are extended and the population of said city increases so that there are five hundred persons living in said extension, after which they shall be increased proportionately if required. And, as an additional fire protection, also to furnish water to fill the present public cisterns if needed, the said water to be used exclusively for fire purposes only, and the said water to remain the property of the said company except in case of fire,
685 obligates itself to pay to the said company, or to such trust company as the Dawson water works may elect, or decide upon as their trustees for their bonds, the sum of two thousand dollars annually for twenty years, in semi-annual payments of one thousand dollars each, on the first day of January and July of each year, the first payment to be made on such of said days as occur after the completion of said works as provided in section 234 of this ordinance; and in case said city shall not have sufficient funds at any of such times to make said payments, or, for any cause, does not pay said money at times fixed as aforesaid, then in that case war-

rants shall be issued on the city treasurer, in favor of the company for the amount due.

SECTION 237. The council shall, and they are hereby required to, make provision each year, for the payment of two thousand dollars as provided in the foregoing section by levying a tax sufficient for that purpose upon the taxable property of the city.

SECTION 238. The company and their successors and assigns is granted the right to make reasonable rates and regulations for the government of private consumers in the use of its water, and to charge such rates for its use as it may from time to time establish. Provided the rates charged per annum shall not exceed those named in the schedule attached, which schedule is immaterial.

SECTION 239. In consideration of said company agreeing to furnish water to the public municipal buildings, and further agreeing to furnish water to two public fountains of one inch nozzle each, the City of Dawson obligates itself to remit to said company, its successors and assigns, any and all license fees, taxes, dues and charges which may at any time hereafter be levied or assessed by
686 said city against said company upon the plant of said system.

SECTION 240. Full assent of the city is given to a charter to be granted by the legislature of the State to said Bennett and his associates, and their successors or assigns, or to be obtained by them under the general incorporation laws of said State, incorporating them into a body politic, to be known as the Dawson Waterworks Company, and granting said company the exclusive right to contract, etc., as herein stated.

SECTION 241. Provides that the ordinance shall be mutually binding upon the City of Dawson and R. L. Bennett and his associates and the company to be organized, and to have the same force and effect of a contract between the respective parties as if drawn in the form of a contract and signed by the contracting parties.

Date of ordinance, February 21st, 1890."

It was shown that R. L. Bennett and his associates were, subsequent to the execution of the contract, incorporated under the name of the Dawson Waterworks Company. It was admitted that the only fire which occurred in the city during the year 1895 occurred on the 19th of February. There was evidence that the city authorities had accepted the works which were built by the Dawson Waterworks Company and that the same cost $40,000; that during the year 1895 the waterworks company had maintained the system in conformity to the contract, and were ready at all times to supply the quantity of water and the pressure required by the contract. It also appeared that at the fire above referred to water from the hydrants of the waterworks company was used in extinguishing the fire; and that the mayor and other city officials were present at the fire and assisted in extin-
687 guishing the same with the water drawn from the system of the waterworks company. It was shown that in December,

1894, the city authorities passed a resolution declaring their intention to abandon the contract, and that notice of such intention was given to the company. There was also evidence offered from which it might be inferred that during the year 1895 the city maintained a fire department as it had existed in former years, and that it was the duty of the officers and members of such department to attend all fires and use appliances placed in their hands by the city to extinguish the same; that without the water furnished by the waterworks company such fire department would be useless. There was, however, evidence that some of the officers of the city understood that they had no authority to use during the year 1895 the water furnish by the waterworks company to extinguish fires. Different members of the fire companies recognized by the city were called as witnesses, some testifying to the effect that they had never received any information as to a change in their status toward the city, or in their duties in reference to fires which might occur during the year in question and their right to use the water of the waterworks company. It was contended by the defendants that the efforts of the city officials to extinguish the fire on the occasion above referred to were purely voluntary, and not in any way intended by them as a recognition of an existing contract between the city and the waterworks company. The court directed the jury to return a verdict in favor of the plaintiff for the amount sued for, with interest, and the defendants excepted.

688 1. The present constitution of this State provides that, "the debt hereafter incurred by any county, municipal corporation, or political division of this State, except as in this constitution provided for, shall not exceed seven per centum of the assessed value of all the taxable property therein, and no such county, municipality, or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenues, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law; but any city, the debt of which does not exceed seven per centum of the assessed value of the taxable property at the time of the adoption of this constitution, may be authorized by law to increase, at any time, the amount of said debt, three per centum upon such assessed valuation." Civil Code, § 5893.

The contract in the present case provides for annual payments of specified amounts to continue during a period of twenty years and the question arises: Is such a contract the incurring by the city authorities of a debt within the meaning of the clause of the constitution above quoted so as to render the contract invalid, unless the same shall have been sanctioned by a vote of two-thirds of the qualified voters of the city at an election held for that purpose? In the case of Ford *v.* Cartersville, 84 Ga. 213, and in the case of Lott *v.* Waycross, *ibid.* 681, a similar question was raised but not decided

by this court, because the facts of those cases did not require an adjudication of the question. The same question arose in the case of Cartersville Improvement, etc. Company *v.* Cartersville, 89 Ga. 683, and was then decided; it being there held that, "without the preliminary sanction of a popular vote, as required by the constitution, a municipal corporation cannot contract for a supply of gas
689 on the credit of the city for a longer period than one year; and a contract which by its terms is to run for twenty years, each year's supply to be paid for quarterly during the year, is operative from year to year only so long as neither of the parties renounces or repudiates it." This ruling was followed in the case of Cartersville Waterworks Company *v.* Cartersville, 89 Ga. 689.

The present case having been ordered by the court to be reargued, upon the second argument permission was given to counsel to review all decisions which have been rendered by this court on the question as to what was meant by the word debt in the clause of the constitution above quoted. Under this permission the decisions specially brought under review are Spann *v.* Webster County 64 Ga. 498, Cabaniss *v.* Hill, 71 Ga. 845, Cartersville Improvement Co. *v.* Cartersville 89 Ga. 683, Cartersville Water Works Co. *v.* Cartersville, *ibid.* 689, Lewis *v.* Lofley, 92 Ga. 804, and Habersham County *v.* Porter Mfg. Co. — Ga. —. We are thus to deal with the question now before us in all respects as if it was before this court for the first time; no ruling heretofore made, being absolutely binding upon us. In order to determine what was the purpose of the framers of the constitution in placing the prohibition contained in the section above quoted upon the various subordinate political divisions of the State, and therefore what they intended to prohibit under the name of debt, it is necessary to take into consideration not only that clause upon which a construction is invoked, but also all the provisions of the constitution relating to the same subject-matter, as well as others relating generally to the matter of public debt. All of these are embraced in article 7 of the constitution (Civil Code, ##5882-
690 5905, inclusive). This article deals with the subjects of "finance, taxation and public debt." The powers of taxation over the whole State which can be exercised by the General Assembly are limited to certain specific purposes—support of Government and public institutions, payment of the public debt, suppression of insurrection, repelling of invasion, defense of the State in time of war, and pensions for soldiers and widows of deceased soldiers who served in the Confederate army. The power to delegate to counties the right to levy a tax is restricted so that a county can never be authorized to impose a public burden upon its inhabitants except for education, expense of public buildings and bridges, maintaining and supporting prisoners, payment of jurors and coroners, for litigation, quarantine, roads, expenses of courts, support of paupers, and payment of debts existing at the time of the adoption of the constitution. Even the State itself is prohibited from incurring any debt except to supply casual deficiencies of revenue, to repel in-

vasion, suppress insurrection, defend itself in time of war, and to pay the public debt existing at the time of the adoption of the constitution. The State cannot pledge its credit to any person or corporation, and it is not allowed to become a joint owner or stockholder in any company, association or corporation. The bonded debt of the State can never be increased except to repel invasion, suppress insurrection and defend the State in time of war. It is expressly declared that when any public property of the State is sold the proceeds of the sale shall be applied to the payment of the bonded debt of the State and shall not be used for any other purpose whatsoever so long as the State has any bonded debt. Provision is made for a sinking fund to pay off and retire the bonds of the State which had not matured when the constitution was adopted.

In addition to the clause above quoted in reference to incur-
691 ring new debts by municipal corporations the following provisions are to be looked to in determining the question now under consideration: "Any county, municipal corporation, or political division of this State, which shall incur any bonded indebtedness under the provisions of this constitution, shall, at or before the time of so doing, provide for the assessment and collection of an annual tax, sufficient in amount to pay the principal and interest of said debt within thirty years from the date of the incurring of said indebtedness." Civil Code, # 5894.

"Municipal corporations shall not incur any debt until provision therefor shall have been made by the municipal government." Civil Code, No. 5897.

We are to determine what was the intention of the framers of the constitution, as well as what was the scheme of government they sought to put into operation so far as it relates to the power of the public authorities to incur debts in behalf of the public. This must be derived from the various provisions of the instrument itself, read in the light of antecedent and concurrent public history. All of those provisions which are material to the question now under consideration have either been quoted or referred to in such a way as that their import can be clearly ascertained. It is not only proper but it is our duty to consider any and all facts and circumstauces which will throw any light upon the question of the intention of the framers of the constitution in reference to the matter now under consideration. It is a matter of public history that at the time that this constitution was framed by the convention and adopted by the people there was an outstanding public debt which the State had contracted for various purposes. There were towns and cities

in the State burdened with debts which had been con-
692 tracted by the public authorities of these corporations, and the manifest tendency was rather to the increase of this class of public burdens than otherwise. There were political divisions in the State where the people were so burdened by debts created by the public authorities that it was clearly apparent that unless some check was placed upon the power of the governing authorities to incur

debts the rates of taxation which would be required in the future to meet the debts would be ruinous. It was also a matter of public history, and it appears in the constitution itself, that a few years before the constitution was adopted there had been an attempt to impose upon the State a debt which had never been legally authorized, and that the State had, in the exercise of its sovereign authority, declared that such debt was never owed by the public, and by an amendment to the then existing constitution the General Assembly was prohibited from paying the same or any part thereof. Taking into review, as the framers of the constitution did, the condition of the public debt of the State, and the condition of the public debt of the various subordinate political divisions of the State, nothing can be plainer than that the power to create debts, incur liabilities and impose burdens to be discharged in the future, was liable to be grossly abused, if the same existed without restrictions, either in the hands of the General Assembly or the authorities of the subordinate public corporations of the State. In the light of all of these facts, what is meant by the various provisions of the constitution we have above referred to? What was the plan to be followed in the future in regard to the public debt of the State itself? Nothing can be clearer. The public debt of the State must not be increased for any purpose except those few above mentioned. No new
693 bonds shall ever be issued except for these purposes, or to take the place of existing bonds that have matured; and the railroads and other property owned by the State, whenever it was deemed best to sell any part of the same, must be used to reduce this bonded debt; the proceeds of the sale, whenever there was a sale, being required to be paid upon the public debt. It is true that the State has plenary power to tax in order to pay the debt, but it is obvious that it was the intention of the makers of the constitution that the taxing power should be so used that this burden should be at some time in the future finally discharged. The State was not to be a perpetual interest paying debtor. The provision relating to the proceeds of the sale of public property, and those creating the sinking fund demonstrated that it was intended that there should be a time when the State would be free from debt. Not only was it the intention of the framers of this instrument that this debt should be paid, but it was equally their intention that no new debt should be incurred by the State except for the purposes heretofore referred to. In brief the State was in debt, and the constitution recognized this fact. The rule laid down for the future was: pay the debt and incur no new obligation. The State must not in the future engage in any work of internal improvement except those of a purely governmental nature. The various departments of government must be supported from year to year by taxation, and only in two instances is the State authorized to incur a debt—the one when it may be necessary to defend itself when attacked either by a foreign enemy from without or a domestic enemy from within, and the other in case it was necessary to make a loan to supply a casual deficiency in the

treasury, and the amount of such loan is expressly limited.
694 It was not contemplated that it would ever be necessary for the State to incur any debt except for these purposes, and therefore the power to create the debt was distinctly taken away by the constitution. In the case of the subordinate public corporations of the State it was seen that in the future as these corporations grew in population it might be best to permit them to incur debts in some instances rather than to impose upon the people resident therein a heavy burden of taxation for any one year. There are many things which are needed by municipal corporations which the State would never need, and therefore the fact that it would be wisest sometimes for municipal corporations to supply themselves with these needed things by borrowing money was recognized by the framers of the constitution, and they did not entirely deprive these subordinate public corporations of the power to incur debt, but simply prescribed that the debt should be incurred in a given way after the consent of the people had been obtained; and that when incurred it should not exceed a certain per-centage upon the assessed value of the taxable property embraced within its limits. The power of the municipality to incur a debt is hedged around with such safe-guards that it is not probable that the conditions imposed can be complied with unless it is manifest that the purpose for which the debt is to be incurred is a proper one, and that the amount of the debt is such that the tax required to discharge it would not be unreasonable and burdensome. While these corporations were not deprived entirely of the power to incur debts as is the State, the same controlling idea in reference to indebtedness by the State is apparent in regard to indebtedness by these subordinate corporations, that is, that there is to be no plan by which a debt is to be perpetually
695 carried by counties and cities. Municipal corporations cannot incur a debt until they provide for paying the same, and they cannot incur a bonded debt unless "at or before the time of so doing" provision is made "for the assessment and collection of an annual tax sufficient in amount to pay the principal and interest of said debt within thirty years from the date of the incurring of said indebtedness." The purpose manifested in the section of the constitution from which the above quotation is taken is that the liability upon the municipal corporation growing out of the incurring of a bonded debt should be met by an accumulation made up from sums taken from the tax payer in annual instalments. They may postpone the payment of the principal of the debt one year, two years, or even to the limit of thirty years, but no further can they go; and no matter what be the period fixed by the municipality in its discretion in which the bonds are to be paid, and no matter when the bonds mature within this period, the terms of the constitution are mandatory—there shall be each year levied a tax which shall be sufficient in amount to pay the interest due during the current year, as well as any part of the principal that may mature that year; and also a sufficient amount in addition to these

items to make a sinking fund which by the end of the bond period will be sufficient to discharge the entire principal of the debt. To illustrate: if sixty bonds are issued, one maturing each year during a period of twenty-nine years, and all the balance maturing at the end of thirty years, there must be a tax levied each year which shall be sufficient in amount to pay the interest falling due during the current year on all unmatured bonds, and pay off the principal of the bonds maturing that year, as well as to raise
696 a sum which going to a sinking fund and being added to each year will, with its accumulations under proper management, produce an amount sufficient at the end of the thirty years to pay off the principal of all the bonds falling due at that time. The controlling idea is that so far as the tax payer is concerned, he is to contribute his proportion annually, whether it go directly to the creditor, or whether it go into the hands of the public officers to be held in trust for the creditor to be paid to him when the debt matures. As has been said, no municipal corporation can incur a bonded debt except one that is to mature within thirty years from its date, and to be paid off and discharged within that time. It is true, as has been stated, that a municipal corporation may incur a debt other than a bonded debt, and the constitution recognizes that it may do so; but it does not say in terms how long such a debt may run, nor that it shall be provided for by annual taxation. But is not this necessarily inferred? If the constitution is so precise and particular in its terms in dealing with the subject of bonded indebtedness by a municipal corporation, would it be reasonable to say that the municipal corporations are to have more latitude in incurring debts of less dignity? If the bonded debt—the contract by specialty—the contract under seal—is to be discharged by annual contributions within a fixed period, is it not necessarily to be presumed that it was intended that the simple contract, the promissory note and the open account, must be provided for in a similar way, and if differing at all in its duration, from the time of contracting to maturity should be less than that allowed for the bonded debt? The authority of the General Assembly to confer upon municipal corporations the power to tax is restricted, but
697 it exists to the extent that a municipal corporation may be authorized to levy taxes for any purpose which is purely public and municipal in its nature. That a municipal corporation may exercise the power of taxation for the purpose of providing its inhabitants with water for domestic use, as well as to provide the city with water to protect the inhabitants from fire is the settled law of this State, and is not questioned in the present case. Frederick *v.* Augusta, 5 Ga. 561; Rome *v.* Cabot, 28 Ga. 50; Weils *v.* Atlanta, 43 Ga. 67. A supply of water for these purposes may be procured by a municipal corporation either by building itself the works necessary for the purpose or by making a contract with other persons to supply the same. In Lott *v.* Waycross, *supra*, this court held that a municipal corporation could contract an indebtedness

for supplying lights to a town without submitting the question to a vote of the people. That case was dealing, it is true, with a contract which was to run for a term of ten years, but all that the court held was that if the amount stipulated to be paid annually was paid during the year in which the service for which the municipal corporation contracted was performed, no indebtedness was incurred by the town. Justice Blandford in the opinion in that case says: "Whether this contract incurs an indebtedness which is required to be submitted to the voters of the town under the constitution, it is not necessary for us now to decide. It may be that the question may never arise, even under this contract, if the sum stipulated to be paid annually for the supply of lights is paid as it becomes due; and if this is a reasonable expense to be incurred by the city, and we do not see why it is not, then the question will never arise. Should the city make default of payment, then the question might arise; and it would have to be decided whether this was such a contract as imposed upon the city an indebtedness such as is contem-
698 plated by the constitution to be submitted to the people. 'Sufficient unto the day is the evil thereof.' Let the light shine in Waycross." That case cannot be used as an authority to uphold as valid the contract under consideration in the present case, except to the extent that if the waterworks company in any year complies with its contract and furnishes water, and the city uses the water and thus receives the benefit of the contract, it can and ought to pay for the service out of the taxes levied during the year in which the water was used. The only effect of the ruling in that case was that no debt within the meaning of that term as it is used in the constitution is incurred by a municipal corporation for a current expense of this character, if the liability growing out of the transaction can be discharged by the payment of money raised by taxation during the current year.

The word debt is defined in various ways. According to the Standard Dictionary, it is "that which one owes to another. Any money, goods, or service that one is bound to pay to another; a pecuniary due." "A thing owed; obligation; liability." Webster's Dic. "A liquidated demand. A sum of money due by certain and express agreement." Anderson's Law Dic.; 3 Black. Com. 154. "All that is due a man under any form of obligation or promise Bouvier. From the foregoing definition it is apparent that the word when taken in a broad and comprehensive sense, includes any obligation to pay money or other thing of value that one is under to another and arises the very moment that the obligation is undertaken, and continues until discharged by payment. Therefore, in this broad and comprehensive sense if any time elapse between the performance of the service on the one hand, and the payment of the money or thing of value which the contract for that service calls for on the other, the relation of the parties to each other will
699 be that of debtor and creditor, and the thing which is owed by one to the other will be a debt. If the word debt is to be

given this meaning in the clause of the constitution now under consideration, then no officer of any public corporation is authorized to purchase for the public any article, no matter how small and trifling, unless payment for the same is made in cash at the time the article is delivered, and no article of necessity in the administration in the various public officers in counties and cities in this State can be ordered to be paid for at any time in the future, no matter how short the time may be between the order for the goods and the delivery of the same. Was it the intention of the framers of the constitution that this strict construction should be given to the words that they have used? It is a matter of public history that from the very organization of the first subordinate public corporation in this State the sums necessary to pay the expenses incident to the administration of public business was raised by taxation levied from year to year upon the person and property of the inhabitants. Public burdens of every nature were divided into annual sums and were discharged by annual taxes collected for the purpose. Almost without exception this was and has been the rule, not only in regard to the subordinate public corporations of the State, but in regard to the State itself. As a general rule public officers are compensated by sums which are paid annually; in other words, it is now and has always been the rule that salaries and all expenses of government are paid by the year out of taxes raised during the year in which the service to be compensated was rendered. The constitution was framed and adopted in the light of this fact, and it is not to be presumed that it was intended by
700 the use of the word debt that an interpretation should be placed upon it which would have the effect of entirely revolutionizing the practice of nearly a century in relation to the way in which public expenses were incurred and discharged. Especially would this meaning not be given to the word when the constitution itself in one of the clauses above quoted, not only expressly recognizes that this is the method of dealing with matters of public expense and public debt, but directly declares that that shall be the rule to be followed as to one class of debts which it authorizes municipal corporations to incur. Debt, therefore, as used in the constitution, is to be understood as a liability which is undertaken and which must be discharged at some time in the future, but which is not to be discharged by a tax levied within the year in which the liability is undertaken. The purpose of the framers of the constitution was to prevent an accumulation of liabilities upon municipal corporations which could be enforced against such corporation in the future by the compulsory levy of taxes. The policy of the constitution is not only against the incurring of liabilities to be discharged in the future for services rendered concurrently with the liability incurred, or previous thereto, but it is equally against the incurring of a liability which is to be discharged in the future, notwithstanding that it depends upon the performance of some service to be rendered in the future. If the character of the undertaking

is such that he who deals with a municipal corporation can, under the contract in the future, of his own volition, and without the consent and over the protest of the authorities of the municipality, place upon it a liability which must be discharged by the levy of a tax in the future, such an undertaking creates a debt within
701 the meaning that the constitution of this State, and one of the very classes of debt which the constitutional provision was made to guard against. If the authorities of a municipal corporation of this State are to be allowed to anticipate far into the future the needs and expenses during each year and to fix in advance an amount that shall be paid for current expenses, and make a contract under which the other contracting party has a right from year to year by a simple performance to put himself in a position where he can demand of the authorities a discharge of the obligation, then it seems to us that the framers of the constitution have done only a vain and idle thing in placing in the fundamental law of the land the clause now under consideration. Apart from the policy of allowing the authorities of municipal corporations to anticipate what should be incurred as a current expense, ten, fifteen or twenty years in the future, we cannot bring our minds to the conclusion that such an undertaking was ever intended to be authorized by the framers of the constitution. Nay more, we are convinced that just such undertakings, the consequences of which are just as disastrous as those obligations under which a present liability is incurred, were in contemplation by the framers of the constitution and intended to be prohibited by this provision. Taking into consideration all of the provisions of the constitution which deal with this subject of debts to be incurred by the public, and taking into consideration the matters of public history above referred to, we are brought to these conclusions as to what was the intention of the framers of the constitution in the matter of debts to be incurred by municipal corporations: (1) The word debt is not to be construed in its broad and unrestricted sense of a liability by one person to pay money
702 or other thing of value to another; (2) a liability for a current expense can be incurred by a municipal corporation for any one year, provided there is at the time of incurring the liability a sufficient sum in the treasury of the city which might lawfully be appropriated to the payment of the liability incurred, or if a sufficient sum to discharge the liability can be raised by taxation during the current year; and that such a transaction would not create a debt within the meaning of that word as it is used in the constitution; (3) it was the purpose of the constitution to provide a system of finance for subordinate public corporations under which there should be each year contracts made for the expenses of the year, and these were to be paid out of moneys arising from taxes levied during the year, that is, that each year's expense should be paid by taxes levied during the year, and no item of expense was to be paid except out of the taxes levied during the year in which the contract for such expense was made; (4) any liability which was not to be dis-

charged by money already in the treasury, or by taxes to be levied during the year in which the contract under which the liability arose was made, is a debt within the meaning of the constitution, and cannot be incurred without the preliminary sanction of a popular vote, unless it be for a temporary loan to supply casual deficiences of revenue. If we are correct in these conclusions, then the contract under consideration in the present case created a debt within the meaning of the constitution, the aggregate amount of which was the sum of the annual rentals therein stipulated to be paid, and it is therefore illegal and not binding except for the first
703 year in which the contract was entered into and for any subsequent years in which the municipality sees proper to receive at the hands of the waterworks company the benefit which the city might derive from the contract.

Counsel for defendant in error earnestly insisted that as it was determined by the Supreme Court of the United States in the case of Walla Walla *v.* Walla Walla Water Company, 19 Sup. Ct. Rep. 77, that contracts of this character did not create debts, and that this decision was so well supported by reason as well as by the current of American authority that we should follow the same, although it was upon a question on which the decisions of that court are not binding upon this court. Notwithstanding the great respect we have for the decisions of that court, we are constrained to disagree with it in the conclusions reached in the case referred to. We cannot, without doing violence to what we believe to be the manifest intention of the framers of the constitution, follow the rulings made by that court and other courts of respectable standing throughout the Union. That the ruling which we make in the present case is in direct conflict with a decision of the highest court in the land, as well as with the current of American authority on the subject, is the best evidence that can be offered to show how strong our convictions must be as to what was intended by the framers of the constitution as we gather it from the instrument itself and the matters of public history of this State which are alluded to above. In the case above referred to the court had under consideration a contract very similar to the one involved in the present case, made by the city of Walla Walla with the water company. The charter of the city provided that "the limit of the indebtedness of the city of Walla Walla is hereby fixed at $50,000." The court comes to the conclusion that the
704 aggregate amount to become due under the contract was not to be added to the existing indebtedness of the city in determining whether the charter limit of indebtedness had been reached, and that there was no indebtedness under the contract until the services therein provided for had been actually rendered. Mr. Justice Brown in the opinion says: "There is a considerable conflict of authority respecting the proper construction of such limitations in municipal charters. There can be no doubt that if the city proposes to purchase outright, or establish a system of waterworks of its own, the section would apply, though bonds were issued therefor,

made payable in the future. (Citing authorities). There are also a number of respectable authorities to the effect that the limitation covers a case where the city agrees to pay a certain sum per annum, if the aggregate amount payable under such agreement exceeds the amount limited by the charter. * * *

But we think the weight of authority, as well as of reason, favors the more liberal construction, that a municipal corporation may contract for a supply of water or gas, or a like necessary, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rentals during the life of the contract may exceed the amount of the indebtedness limited by the charter. There is a distinction between a debt and a contract for a future indebtedness to be incurred provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of a public improvement, though such debt be payable in the future by instalments. In the one case the indebtedness is not created until the consideration has been fur-
705 nished; in the other, the debt is created at once, the time of payment being only postponed.

In the case under consideration the annual rental did not become an indebtedness, within the meaning of the charter, until the water appropriate to that year had been furnished. If the company had failed to furnish it, the rental would not have been payable at all; and, while the original contract provided for the creation of that indebtedness, it was only upon condition that the company perform its own obligation. * * * A different construction might be disastrous to the interests of the city, since it is obviously debarred from purchasing or establishing a plant of its own exceeding in value the limited amount and is forced to contract with some company which is willing to incur the large expense necessary in erecting waterworks upon the faith of the city paying its annual rentals. (Citing authorities).

The obvious purpose of limitations of this kind in municipal charters is to prevent the improvident contracting of debts for other than the ordinary current expenses of the municipality. It certainly has no reference to the debts incurred for the salaries of municipal officers, members of the fire and police departments, school teachers, or other salaried employees, to whom the city necessarily becomes indebted in the ordinary conduct of municipal affairs, and for the discharge of which money is annually raised by taxation. For all purposes necessary to the exercise of their corporate powers they are at liberty to make contracts, regardless of the statutory limitation, provided, at least, that the amount to be raised each year does not exceed the indebtedness allowed by the charter. Among these purposes is the prevention of fires, and purchase of fire
706 engines, the pay of firemen, and the supply of water by the payment of annual rentals therefor."

The learned justice in the opinion cites the case of Lott *v.* Waycross, *supra*, as one of the authorities to sustain his position. He has entirely misconceived the scope of this decision. The question dealt with by him is expressly left open and undecided.

Upon two propositions we are compelled to take issue with the learned justice who delivered the opinion. First, we cannot agree that there is such a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party performs the agreement out of which the debt may arise, as that a municipal corporation may make a contract of the latter character, when it is expressly prohibited from creating a debt. In the consequences resulting, in the effect upon the tax payers, and in every way that either may be productive of harm the two are identical. In each a liability is incurred and the party contracting with the city, no matter what we may call him—creditor, or contracting party in an agreement for future indebtedness—has by the simple performance on his part of some act provided for in the agreement, the right to use the strong arm of the law to compel the city to pay him therefor. A city thus situated is under an obligation that it cannot throw off; has upon it the weight of a burden that it is bound to carry, is powerless to defeat, if it is desired to do so, the claims of him with whom it has contracted, is in debt, and no argument founded upon sound reason can ever make it otherwise.

Second, we cannot agree that the obvious purpose of limita-
707 tions of this character is to prevent the improvident contracting of debts for other than the ordinary current expenses of the municipality. It seems to us clear from what we have stated that the almost expressly avowed purpose of the framers of the constitution was not only to prevent the improvident contracting of debts for other than the ordinary current expenses, but also to prevent the improvident contracting of debts for all purposes, whether for current expenses or otherwise, except by the sanction of a popular vote, unless for some reason there should be during the year a deficiency in the revenue raised for the purpose of paying the current expenses of the municipality. If contracts of the kind now under consideration are to be allowed on the ground that they are for current expenses, then it would seem that there was no reason for that provision in the section which authorizes a temporary loan to supply a casual deficiency. The power to make a temporary loan for a casual deficiency being expressly conferred, but emphasizes the fact that the constitutional plan was that there should be a balancing of accounts at stated periods of time, at the end of the calendar year or the fiscal year of the corporation, when the amounts raised by taxation on the one nand should be applied to the sums incurred as expenses on the other; and if during the period in which the expense was incurred and the tax was levied by some oversight the levy was not of sufficient amount to pay the expenses, the deficiency casual in its nature, which was contemplated by the constitution arose, and could be supplied by a temporary loan. The period

marked by the calendar year or an arbitrary fiscal year was evidently in contemplation by the framers of the constitution, as that is in accord with the custom so long existing in this State.

The conclusion reached by the Supreme Court of the
708 United States in the Walla Walla case seems to be sustained by the decisions in the following cases: Grant *v.* Davenport, 36 Iowa, 396; Budd *v.* Budd, 59 Fed. 735; City of Valparaiso *v.* Gardner, (Ind.) 49 Am. Rep. 416; Raton Water Works Co. *v.* Raton, (N. M.) 49 Pac. 898; Creston Water Works Co. *v.* Creston (Iowa) 70 N. W. 739; Wade *v.* Borough of Oakmont (Pa.) 30 Atl. 959; Utica Water Works Co. *v.* City of Utica, 31 Hun. 426; Woods *v.* City of Oklahoma, 2 Okl. 158; Divley *v.* Cedar Falls, 27 Iowa, 227; Dwyer *v.* City of Brenham, 65 Tex. 526; Lamar Water, etc. Co. *v.* Lamar, 128 Mo. 188; Western *v.* Syracuse, 17 N. Y. 110; Stedman *v.* City of Berlin (Wis.) 73 N. W. 57; New Orleans Gas Light Co. *v.* New Orleans (La.) 7 So. 559; City of East St. Louis *v.* Gas Light & Coke Co., 98 Ill. 415; McBean *v.* City of Fresno 112 Cal. 159; Smith *v.* Dedham, 144 Mass. 177; Seitzinger *v.* Temaqua, (Pa.) 41 Atl. 454. In the following cases the conclusion reached seems to sustain the ruling made in the present case: Appeal of the City of Erie, 91 Pa. St. 398; Humphreys *v.* City of Bayonne (N. J.) 26 Atl. 81; Niles Water Works Co. *v.* City of Niles (Mich.) 26 N. W. 525; Salem Water Co. *v.* City of Salem 5 Or. 29. In none of the cases was the constitutional or charter provision in which the word debt was used exactly identical with the words of our constiution, but in some of them there is no material difference, and this is true of a greater number of the cases cited on each side of the question. Believing that no other conclusion would carry into effect the constitution as its framers intended, we have nothing to do with the argument that the result reached by us may be disastrous to municipal corporations desiring to make public improvements. We do not believe, however, that the consequences will ever be so disastrous as
709 seems to be anticipated by counsel in the present case or by justices in decisions in cases where a contrary view that that expressed by us is taken. So far as we are concerned, we are satisfied with the policy of the constitution, which as we believe, demands annual adjustments of municipal expenses and municipal taxes, with the requirement that the expenses each year shall be discharged by the taxes of that year, save only in the two cases provided for in the constitution—consent of the inhabitants of the municipality, and a casual deficiency in the revenue.

All of the cases heretofore decided by this court, in which the matter now under consideration was directly dealt with, will now be considered in the light of what we have said, and attention will be directed to the effect of the ruling made in the present case, whatever it may be, upon each of the rulings heretofore made by this court. The first case on this question that came before this court after the adoption of the constitution of 1877 seems to have been Hudson *v.* Marietta, 64 Ga. 286. Only two justices participated

in this decision, and therefore, if it is in conflict with the views now entertained by us, it need not be formally overruled. All that is in this case that bears at all upon the question now under consideration is the language of Chief Justice Jackson, quoted in another part of this opinion, as to the intention of the framers of the constitution, and his views therein expressed seem to be entirely in accord with those now entertained by us.

In Spann *v.* Webster County, 64 Ga. 498, it was held that under the constitution of 1877 a county could not levy a tax "to buy a safe, without the assent of two-thirds of the voters at an election held for that purpose." Justice Jackson in the opinion says: "The
710 levy of twenty-two per centum for iron safes is not mentioned in the purposes enumerated in the second paragraph of the sixth section and seventh article; nor are there words therein which, without much latitude of construction, can be construed to authorize the tax. Besides, the purchase of these safes is the creation of a new debt since the adoption of the constitution of 1877, and expressly prohibited by the first paragraph of the seventh section of article seven, 'without the assent of two-thirds of the qualified voters of the county at an election for that purpose, to be held as may be prescribed by law.' No such election has been held, and a new debt, without its sanction as a condition precedent, cannot be imposed. * * *

It was the purpose of the framers of that constitution to tap the root of that system of indebtedness by counties, cities and towns, which was growing into immense proportions and spreading mildew and blight everywhere over the land; and it is made our duty by the same constitution to declare all laws in violation of its provisions and prohibitions to be null and void."

These safes might have been bought on a credit and a debt incurred therefor prior to this constitution, Code, ## 497–502; and they may be bought still, if the county should have surplus funds from any source to pay cash for them, Code, # 528; or if the debt be incurred with the assent of two-thirds of the voters of the county, but not otherwise." So far as that case may be authority for the position that a contract for the purchase of articles of the nature therein dealt with will not be lawful, notwithstanding there has been, or may be, during the current year in which the contract of purchase is made a tax levied, which will realize a sufficient amount which can be lawfully appropriated to discharge the obligation, the
711 same is overruled, as being in conflict with the views hereinbefore presented.

In Rome *v.* McWilliams, 67 Ga. 106, it was held by two justices, that, "where a tax has been levied by a municipal corporation sufficient to cover an anticipated expenditure for city offices or the like, it is not necessary to delay taking any steps towards securing such improvements until the money is actually in the treasury. To have work done and pay for it at its completion, or by instalments during its progress, having the money ready when the time

of payment arrives, is not to incur a debt within the meaning of the constitutional prohibition on that subject." In the opinion Justice Speer uses this language: "An obligation arising under a contract on the part of a municipal corporation to pay for work when and as it shall be performed *in the future*, does not constitute or ripen into an indebtedness within the meaning of the constitution till at least the performance of the work. * * *

If this were so, then it would be impossible, in a majority of instances, to even contract for the most necessary public building without a prior levy and deposit of money in the treasury. The obligation to pay, so far as the time of its inception as between the parties is concerned, is one thing, and an actual *indebtedness* within the meaning of the constitution is another. I may enter into a contract for an architect to build me a house, but if he never does the work I owe him nothing; so if I pay him as he progresses, I will not be his debtor; so if I contract to pay him when the work is done, I owe him nothing till the contract is fulfilled, and if on its fulfillment I discharge it, I cannot be said to have incurred a debt in the sense the constitution prohibits corporations from incurring." Chief Justice Jackson in a concurring opinion distinguishes this case from Hudson *v.*
712 Marietta, and Spann *v.* Webster County, *supra*, and in reference to the latter case he uses this language: "It is true that in the county case in delivering the opinion I do also invoke the other clause of the constitution, and use expressions going to show that something like this—iron safes—to be paid for by taxes, is a debt in the sense of the constitution, but I say there that if the county had money legitimately drawn from other sources, it could pay for the safe. In this case this money will be in the treasury, legitimately put there by taxation for current and ordinary expenses—the prime necessity of a municipal government, a city hall and appurtenances; and I think that the constitutional prohibition against new debts does not cover such a case." Justice Crawford in his dissenting opinion, after referring to the constitutional provision under consideration, says: "It is admitted that a new debt could not be incurred except as above provided. Then, the question is, whether a city can levy a tax with which to pay a future liability that it could not legally incur. If the right exists to make the contract, *the time when* the payment is to be made is wholly immaterial; it neither enlarges the power nor changes the nature of the liability. It is the incurring of a new debt, whether paid for when the work is done, or five years thereafter; it is a debt from the making the bargain until paid, be that when it may.

To say that *for a new debt* to be incurred, with which to build a town hall, without first submitting it to the people, would be *unconstitutional*, and to say that the levy of a tax to build a town hall without submitting that to the people would be *constitutional*, does not seem to me to be either law or logic. This provision in the con-

stitution was to give the tax payers the right to say whether
713 the *expenditure* should be made, and to require their assent before the taxes should be laid for such expenditure." Some of the language of Justice Speer is in direct conflict with the views now entertained by us, and we decline to follow his reasoning. Taking the case in the light of the concurring opinion of the chief justice, the judgment in that case does not conflict with the ruling now made. The views entertained by the dissenting justice go much farther in the line of strict construction than we ourselves are prepared to go.

While no ruling was made directly on the question now before us in Walsh *v.* Augusta, 67 Ga. 293, the clause of the constitution with which we are now dealing was under consideration, and it may not be inappropriate to quote here some of the language of Chief Justice Jackson, where he calls attention to the evil which was intended to be remedied by the clause of the constitution now under consideration. After referring to the law in relation to such matters as it existed before the adoption of the constitution, he says: "What was the evil? It was the evil attendant upon all people who handle money not their own. The cities of the State incurred a very heavy indebtedness—some of them became insolvent. To levy taxes enough to pay them would work the ruin of the citizens and blight the prospects of the city. Not to levy and pay them would be to destroy credit and soil honor. The cities are the arteries of the body politic. With them destroyed or sluggish, the heart, the very life of the Republic, would cease to beat, or pulsate with a feeble supply of vital fluid. So that in their health is involved that of the entire Commonwealth and to suffer their honor to be tarnished is to soil that of the State. Therefore the strong language used by this court in 64 Ga. 286 and 498, in respect to the evils resulting
714 from this unlimited power to incur city indebtedness with only the slight check of the sanction of a majority of the voters, without regard to their property or intelligence is sober though figurative—it is stern truth and no flight of fancy. One of the largest cities of a sister State actually surrendered her franchises and ceased to be corporate, because of the extravagant debts her authorities had incurred, and her total inability to meet them; and one of our own was almost in the throes of death because of the burden under which she staggered.

To stop this tide of evil, which always swells in the calm of prosperity and peace rather than in the storm of adverse weather, when all eyes are watching the danger, the framers of the constitution of 1877 inserted this paragraph and the succeeding paragraph of this section; and reading them in the light of the old constitution, the mischief and the remedy, we think the meaning will become apparent, despite the confusion which arises from the inaccurate use of the words.

The framers of it could not extinguish past indebtedness of cities. The Constitution of the United States prohibited their doing so, be-

cause the obligation of contracts would be destroyed. But they did everything else which they had power to do to stay this tide and keep Georgia above its flood. They prohibited all cities from making any new debt, unless sanctioned by two-thirds, instead of a majority, of the voters, except small loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum upon the taxable property thereof. They, then, even with this sanction of two-thirds of the citizens to a new debt, required a provision for the payment of this debt by the assessment and collection of an annual tax sufficient to pay the principal and interest of the debt within thirty years. * * *

715 Thus determined to preserve the honor and credit of the State by preserving that of her minor governments, the framers of the constitution of 1877 inserted these checks on new debts of cities. First, two-thirds must vote them, and second, preparation must be made by taxation to pay them, and the voter, when he deposits his ballot, must know that he puts no burden on posterity which he will not assume himself, but every year he must pay his quota for interest and a sinking fund for principal to be levied and collected on his property."

In Pennington *v.* Gammon, 67 Ga. 456, it was held that a county may organize a chaingang, to be composed of convicts to work on the public roads, street, or other public works, and that provision may be made for their safe keeping and employment, and that if when engaged in a work of this character there should arise a necessity to purchase tools and implements necessary for the work the county could when too late to levy a tax for this purpose incur a debt, this being a casual deficiency in the revenue, within the meaning of that expression as it is used in the constitution; the amount of such debt, however, not to exceed the limit fixed by the constitution, that is, one-fifth of one per centum upon the assessed value of the taxable property of the county. There is nothing in this decision which conflicts with what we now rule, but it seems to be in line with the argument which we have pursued.

In Butts *v.* Little, 68 Ga. 272, it was held that a contract by a county for the erection of a building at a specified price to be completed by a given date and payment to be made as the work progressed was, in effect, a contract to pay the price agreed on by the date of completion fixed; and that where the amount of such

716 price was more than could be lawfully raised by taxation, a debt was incurred within the meaning of the constitution, and the contract was invalid because it had not been authorized by a popular vote in the manner prescribed by the constitution. While the contract under consideration in that case was thus declared to be void, the judgment was reversed on terms: the effect of the decision being to authorize the making of a contract which would provide that the cost of the building as it fell due should be met annually by the levy of one-fifth of one per centum on the assessed value of the taxable property of the county. This part of

the decision seems to be based upon the idea that a county would have a right to anticipate a casual deficiency in the revenue which might arise in future years. It is not necessary to refer further to this decision as anything said therein which is in conflict with the present decision was overruled in Lewis *v.* Lofley, *infra.*

In Cabaniss *v.* Hill, 74 Ga. 845, the ruling made in the case of Spann *v.* Webster County, *supra*, was followed, and in the opinion Chief Justice Jackson, after a ruling to that effect, in referring to the particular facts of the case then under consideration, says: "But even if this contract does not create a debt, these orders were made payable only out of the proceeds of the taxes for the new jail in the year 1884. So far as they show an acceptance of the work of the movants—a promise to pay the price fixed by contract if the work were satisfactory—these orders are on the treasurer, not to be paid out of any general fund or future levy of taxes but out of a tax already levied for the jail into *into* which the work was to go and of which it was to become a part; and it may be that this provision in the orders, as payable out of money in sight, already provided for, might be construed into a sort of cash arrangement, and not
717 a debt in the sense of the constitution. If anything can save it from being a new debt, it is this arrangement to pay out of funds, not in the treasury it is true, but on the way to it." It is true it was held in that case that a county would not be compelled by mandamus to pay the claim, because the fund upon which the orders were drawn had been exhausted and there was no fund with which to pay the debt either in the treasury or on its way thereto. So far as the ruling in the case is concerned, it is in conflict with the views we now entertain, and the case must be therefore overruled, for the same reason that the case upon which the ruling was based is overruled.

In Conyers *v.* Kirk, 78 Ga. 480, it was held that, "a municipal corporation can make a cash contract for current supplies, such as lamps and gasoline for lighting the streets, through its appropriate officers or committees, as effectually as by formal order or resolution entered on its minutes." Chief Justice Bleckley in the opinion says: "The facts of this case, taken most strongly in favor of the prevailing party, as they must be after verdict, do not show any purpose or intention to create a debt. The debt resulted from a breach of the contract, not from the making of it. Against paying a debt so originating, there is no constitutional impediment. When a cash purchase is made, there is no expectation that any debt will exist, and there was no such contemplation in this case. If we take the evidence, as we do, most favorably for the plaintiff, there was no intention that any debt should arise. It was contemplated that payment should be made as soon as the articles were delivered; and the reason indicated in the record why payment was not then in fact made was the accidental absence of the city treasurer from his office. So that this debt (and it is a debt now) became
718 such, not by virtue of making the contract, but by virtue of breaking the contract; and surely there never can be and

never will be any law against paying a debt which arises from default in making a cash payment at the time the debtor ought to have made it, the cash sufficient for the purpose being then in the debtor's treasury."

The decision and the reasoning upon which it is based is not in conflict with what we now rule, but both tend rather to support our conclusions than otherwise.

In Cartersville Improvement Company *v.* Cartersville, 89 Ga. 683, the conclusion reached was expressed in a headnote, which is as follows: "Without the preliminary sanction of a popular vote, as required by the constitution, a municipal corporation cannot contract for a supply of gas on the credit of the city for a longer period than one year; and a contract which by its terms is to run for twenty years, each year's supply to be paid for quarterly during the year, is operative from year to year only so long as neither of the parties renounces or repudiates it. Either of them can terminate it at the end of any year, but so long as it stands and is complied with by one party, the other party must comply also." There was no opinion filed in the case. The conclusion reached in that case, was in our opinion, correct, and we believe that the reasons which have been heretofore given are sufficient to show that such is the case, and therefore we approve the ruling therein made and decline to overrule the decision.

The decision in the case just referred to was followed in the case of Cartersville Water Company *v.* Cartersville, 89 Ga. 689.

In Lewis *v.* Lofley, 92 Ga. 804, the case of Butts *v.* Little,
719 *supra*, was overruled, so far as it was in conflict with what was there ruled. The court there held that, "Without the preliminary sanction of a popular vote as required by the constitution, the public authorities of a county cannot contract for the building of a courthouse on the credit of the county for an amount in excess of funds in hand and the proceeds of taxation applicable to the object for the year in which the contract is made. Justice Simmons in the opinion says: "We see no reason, therefore, why the county authorities may not levy a sufficient tax in one year to pay for the erection of a court-house, if the tax be not exhorbitant; and if they can do this, no reason now occurs to us why they cannot make a contract for its erection, the cost to be paid out of the taxes thus levied. If there are funds in the county treasury sufficient for the purpose the county authorities may contract for its erection, payment to be made when the building is completed, or installments as the work progresses. Or if taxes are levied or can legally be levied for the year, sufficient for the purpose, they may contract to pay for it out of such taxes although they are uncollected."

There was no ruling at all on the question now under consideration in the case of Dawson Water Company *v.* Carver, 95 Ga. 565.

In Habersham County *v.* Porter Mfg. Co., — Ga. — the decision in Lewis *v.* Lofley was under review and was in that case adhered to and reaffirmed. When we had under consideration the case last

cited we saw no reason why the conclusion reached in Lewis *v.* Lofley was not sound, and we do not now see any reason for overruling or modifying either decision. Both of them seem to be in accord with our views as above expressed, and for that reason the conclusion reached in each case is adhered to and reaffirmed.

720 It appears, therefore, that nothing that is herein said is in conflict with what has been heretofore ruled by this court, excepting the cases of Spann *v.* Webster County, Cabaniss *v.* Hill, and Butts *v.* Little. The first two cases are now overruled, so far as there is anything in either to conflict with what we now hold, and Butts *v.* Little, so far as it is inconsistent with the ruling now made, has never been followed, and, has been, to that extent, expressly overruled, as we have seen, in Lewis *v.* Lofley.

The conclusions reached, as well as the reasoning upon which such conclusions are based, in all other cases is not only not in conflict with what we now rule, but in entire accord with the same. It may therefore be now accepted as the settled law of this State that contracts of the character under consideration in the present case, so far as they attempt to provide for the payment of any sum other than that for the year in which the contract is made, create a debt within the meaning of the constitution and is subject, after the expiration of the first year, to repudiation by either party.

2. While it may not be necessary in the present case to decide whether the clause of the constitution under consideration requires legislative action prescribing the way in which the election therein provided for shall be held, my investigations have satisfied me that such legislative action is essential to the validity of the election. The reasons which bring me to this conclusion will be stated, but on this question I am speaking for myself alone.

Any liability which is a debt within the meaning of the constitutional provision above quoted cannot be incurred without

721 the assent of two-thirds of the qualified voters of the municipal corporation "at an election for that purpose, to be held as may be prescribed by law." In the case of Hudson *v.* Marietta, 61 Ga. 286, it was held in a decision rendered by two justices that, until the General Assembly had by an act prescribed the manner of holding the election, a municipal corporation had no authority to incur a debt in order to make an exchange of fire engines in the fire department of the city. It was further held that "a mere vote on the question of exchange or no exchange, held under no law passed by the General Assembly to carry into effect the mode of avoiding this prohibition, on new debts and held under no law of the State or the city prescribed for such an election at any time, cannot be held to be such an authorization of a new debt as will comply with the constitution and relieve the city from the prohibition." Justice Jackson, speaking almost in the very atmosphere of the convention which adopted this constitution, after quoting the section with which we are *dealing*, uses this language: "It is not pretended that any law has been passed authorizing such in-

crease of debt, or to hold such an election as is contemplated in the above cited section; and the election actually held did not comply with the constitution. So that it is an effort on the part of this city to make a new debt, incurred to procure a steam fire engine in the place of an old hand engine, at a considerable cost, without complying with that provision of our present constitution. It cannot be done. The provision is inserted therein to stop, to dam up, this deluge of city and county debts which is flooding the country and sinking the best interests of the people." When the constitution provides that no municipal corporation shall incur a debt until an election for that purpose shall be held "as may be prescribed
722 by law," it undoubtedly contemplates that action by the General Assembly is necessary in order to carry into effect the provision which authorizes municipal corporations under certain conditions to incur new debts. The decision above referred to clearly establishes this proposition. See in this connection Elliott v. Gammon, 76 Ga. 766. There must be either a general law prescribing the manner of holding the election, or, in the absence of such general law, each municipal corporation desiring to incur a new debt must have express legislative authority prescribing the manner in which the election shall be held. The constitutional provision does not empower either municipal corporations existing at the time of its adoption or those created thereafter to deal with the subject of elections to incur debts. The constitution further contemplates that the debt incurred by municipal corporations may belong to that class known as a "bonded indebtedness," and it prescribes what shall be done by the municipality when the debt belongs to that class. Civil Code, ≠ 5894. That municipal corporations may incur debts other than a bonded indebtedness is also contemplated by the constitution, for it is therein provided that "municipal corporations shall not incur any debt until provision shall have been made by the municipal government." Civil Code, ≠ 5897. If a municipal corporation incurs a bonded indebtedness it is required that there shall be the "assessment and collection of annual tax, sufficient in amount to pay the principal and interest of said debt within thirty years from the date of the incurring of said indebtedness." Civil Code, ≠ 5894. If the debt to be incurred is one other than a bonded debt the constitution still requires, as above shown, that provisions shall be made for the payment of the same, but the limitations placed upon the corporation in regard to bonded indebtedness is not imposed in regard to other debts. While municipal corpo-
723 rations may incur debts both bonded and otherwise, still whatever the character of the debt may be, if it does not come within the exception referred to in the clause of the constitution first quoted, the debt cannot be incurred until the assent of two-thirds of the qualified voters has been obtained at an election held in the manner prescribed by law.

3. The General Assembly has prescribed the manner in which the election shall be held when the debt to be incurred is a bonded

debt. Pol. Code # 377 *et seq.* It is provided that the city authorities shall give notice for the space of thirty days next preceding the day of the election, in the newspaper in which the sheriff's advertisements for the county are published, notifying the qualified voters that on the day named the election shall be held. In the notice the amount of bonds to be issued, what interest they are to bear, how much principal and interest to be paid annually, and when to be fully paid off shall be specified. The election shall be held at all of the voting precincts within the limits of the municipality, and shall be held in the same manner and by the same persons, and under the same rules and regulations that elections for municipal officers are held, and the return shall be made to the officers calling the election. In determining the question whether or not two-thirds of the qualified voters of the municipality voted in favor of the issuance of the bonds, the tally sheets of the last general election held in the municipality shall be taken as a correct enumeration of the qualified voters. Whether or not a registry of the voters is necessary at any such election depends upon the charter provisions of each city, as will be seen by reference to the following cases: Bell *v.* Americus, 79 Ga. 153; Gavin *v.* Atlanta, 86 Ga. 132; Kaigler *v.* Roberts, 89 Ga. 476; Howell *v.* Athens, 91 Ga. 139; Heilbron *v.* Cuthbert, 96 Ga. 312.

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4. There is no general law of this State prescribing the manner in which an election shall be held by municipal corporations on the question of incurring a debt other than a bonded debt within the meaning of the constitutional provision above referred to. The General Assembly has never expressly conferred upon the city council of Dawson the power to prescribe the manner of holding an election in that city for this purpose. In the absence of a general law providing for such election and in the absence of a special law expressly conferring upon the municipality power to deal with this subject, is not any election held clearly without authority of law? See Hudson *v.* Marietta, *supra.* If it was necessary to so hold in the present case, there would be nothing in such a ruling to conflict with the decision of this court in Mayor, etc. of Griffin *v.* Inman, 57 Ga. 320. The city authorities of Griffin had express legislative power on a recommendation of a majority of citizens, either in public meeting or by public election, to subscribe for the stock of railroads, to borrow money on the faith and credit of the city, to pay for the same, and to impose a special tax to meet the debt thus created. It was held that an amendment to the charter of the city passed in 1859 which contained the provision above referred to, was not repealed by that clause of the constitution of 1868 which declares that, "No law shall be passed by which a citizen shall be compelled, against his consent, directly or indirectly, to become a stockholder in, or to contribute to, any railroad, * * * except in the case of the inhabitants of a corporate town or city. In such cases the General Assembly may permit the corporate authorities to take such stock or to make such contribution * * * after a majority of the qualified voters, of such town or city, voting

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at an election held for the purpose, shall have voted in favor of the same, but not otherwise." It was further held that the amendment should be construed in connection with the clause of the constitution above quoted, and thus construing the two together, the proper mode of taking the sense of the citizens in 1871 was to order a public election by all of the qualified voters of the city, with the privilege to each and every qualified voter to vote for or against the proposed subscription. The question as to whether in such a case a legislative act was necessary was not involved, because there was a legislative act authorizing the city to hold the election and the only question was as to who was embraced within the meaning of the term citizen as it was used in that act.

5. But even conceding for the sake of the argument that no legislative action was necessary in order to authorize a municipal corporation to call an election, we cannot hold that what was done by the city authorities of Dawson in this case was, in any sense of the word, a compliance with either the letter or the spirit of the constitution. The purpose of the constitution was to limit the amount of indebtedness that could be incurred by cities and within the limit thus fixed to provide with one single exception, that is, the case of casual deficiencies of revenue, that all debts incurred should have the assent of two-thirds of the qualified voters of the new municipality. If the ordinance calling the election does not prescribe the amount of indebtedness to be incurred, and if the notice of the election does not fix an amount, no matter whether the vote be unanimous or not, the whole purpose of the constitutional provision is thwarted. To hold that such an ordinance and such a notice would give
726 a municipal corporation the power to incur whatever debt is necessary to accomplish the object referred to in the ordinance and the notice would be simply conferring upon the city authorities unlimited power to do that which the constitution says that they shall not have authority to do. If two-thirds of the qualified voters of a city can confer upon municipal officers the power to incur an unlimited debt in order to provide waterworks, why may not the voters, instead of dealing with the subject of municipal expenses separately, simply empower the authorities to incur expenses necessary for waterworks, electric lights, police, and all other things needful for the successful administration of the city government, and thus avoid the expense and trouble of submitting these questions from time to time to the qualified voters. It seems to us that argument is unnecessary to establish the proposition, that an election held under such a notice would be practically a nullification of the constitutional provision. If we are correct in this, the ordinance passed by the city authorities of Dawson providing for an election, and the notice published in pursuance thereof, was not such a compliance with the constitution as would authorize them to incur any debt whatever. And this view of the case is strengthened when we take into consideration that the election was held in 1886, and the contract claimed to have been made pursuant to that election was not

made until 1890, four years later, and that there is nothing to indicate that the people who voted at the election had the slightest conception of the amount of debt to be incurred, when to be paid, or of the details of the contract of indebtedness which is now claimed they assented to by voting in the election. The policy of the constitution is against the incurring of municipal debts, and therefore the constitutional provision prescribing the manner in which debts must be incurred is to be strictly construed. It has been
727 the uniform ruling of this court that not only the constitutional provision must be strictly construed but that the act of the General Assembly prescribing the manner in which an election shall be held on the question of bonded indebtedness shall be also strictly construed. Walsh *v.* Augusta, 67 Ga. 293; Cabaniss *v.* Hill, 74 Ga. 845; Bowen *v.* Greensboro, 79 Ga. 709; Athens *v.* Hemerick, 89 Ga. 674; Ponder *v.* Forsyth, 96 Ga. 572; Perry *v.* Norwood, 99 Ga. 300. While an examination of the cases cited will probably show that in the latter cases there has been some departure from the very strict rule of construction laid down in the earlier decisions, no such departure has taken place as would justify us in holding that the notice of an election where the question of incurring a debt is to be decided would be sufficient when the amount of the debt to be incurred was not, in any way specified, either in the ordinance calling for the election, or in the notice. In the case of Irvin *v.* Gregory, 86 Ga. 605, it was held that in an election held to determine whether a school law should be adopted, a failure to publish the notice of the election the number of times required by law, would be held to be a mere irregularity after the election had been held and the result acquiesced in by the citizens. In the case of Brand *v.* Lawrenceville, — Ga. —, it was held that, "though the notice of the election provided for by such an act may not in the clearest and most unequivocal terms have submitted to the qualified voters the question of adopting the act itself, yet, where the terms of the notice were such as to show that this question was necessarily to be passed upon in the election, the failure to use more explicit language in this respect (the notice, as to all other matters, being sufficient) will, after the election has taken place, and after the bonds, in pursuance of its result, have been issued and sold
728 and their proceeds applied as required by the act, be treated as a mere irregularity, not invalidating the bonds, and one of which it is too late for a tax payer who participated in the election, and who had knowledge of all the facts to complain."

6. It is contended, however, that the city authorities should not be allowed to set up the defense insisted upon in this case, because the waterworks company, upon the faith of the contract, has expended a large amount of money in constructing the plant necessary to operate the system, and that it would be such a fraud upon them to now refuse to pay that the municipal authorities should be estopped from setting up the want of power to make the contract sued upon. All persons who deal with public officers act at their peril, and are

charged by law with notice of the authority of the officers with whom they deal. If the city authorities of Dawson had no power under the constitution and laws of this State to hold the election and make the debt claimed to have been incurred in pursuance thereof, the waterworks company is charged with notice of such want of power, and it cannot be said to be a fraud upon it to set up a defense based upon a fact of which it was charged by law with notice. Even if a benefit has been received by one of the contracting parties from the contract which is void because prohibited by the constitution or because contrary to public policy, the receiving of such benefit will not prevent the party receiving it from setting up against a suit to enforce the contract the defense that the contract was illegal and void. See Railroad Co. *v.* Athens, 85 Ga., 367. To establish the rule that all that is necessary to prevent a city from pleading that under the constitution and laws of the State it could not incur the indebtedness sought to be charged against it would be to show that the alleged illegal contract had been fully performed
729 on one side, would place entirely within the power of persons desiring to make illegal contracts the determination of the question as to whether the constitution of the State shall be enforced in a particular instance. Where a municipal corporation has the power to incur a debt, and the debt is incurred in an irregular way, it is settled law that the innocent holder of a negotiable instrument issued by the authorities of such city, and which recites a compliance with the law in regard to the incurring of the debt, will be entitled to prevail in a suit to enforce the collection of such instrument notwithstanding a defense setting up the irregularities in the manner in which the debt was incurred. Black *v.* Cohen, 52 Ga. 621. The contest in the present case being between the original parties to the contract, and no negotiable instrument ever having been issued, the law in relation to the innocent holders of such instruments has no application whatever. The promoters who were afterwards incorporated as the Dawson Waterworks Company were charged by law with knowledge of what the constitution and statutes of this State required in regard to such contract as well as what had transpired in the city of Dawson and now claimed by them to be a compliance with the law in regard to the incurring of debts; and it being, as we have shown, not within the power of the city of Dawson to make the contract, no estoppel is raised by law to prevent the city authorities from calling in question the legality of the contract relied on by the defendant in error.

7. When this case was here before, — Ga. — it was ruled that "this being an action against a municipal corporation for a year's supply of water in which the plaintiff's right of recovery depends upon the validity of an alleged contract between it and the defendant, covering a period of years, and the
730 evidence not affirmatively disclosing that when the contract was originally made the municipal corporation had, in the manner prescribed by the constitution of this State, made due and

lawful provision for the payment of the yearly sums to become due on such contract, it was error to direct a verdict for the plaintiff." There is nothing in our present ruling which conflicts with this decision. Upon an investigation of the case as *then presented* it was found that one absolutely essential element necessary to constitute a cause of action was wanting, and the case was reversed because the direction of a verdict for the plaintiff was erroneous for that reason. There was no ruling made on any of the questions now decided, although such questions were made in the record. The record in the case did not disclose an ordinance which made provision for the debt, and if all of the other constitutional and statutory requirements had been present, the absence of this ordinance would have required a reversal of the case. The extent of the ruling in that case was simply that without such an ordinance there could be no cause of action, and whether the other element necessary to constitute the cause of action were present was not passed upon.

8. While either party to the contract in question can determine it at the end of any year, as long as it stands and is complied with by one party, the other must comply also. Ford *v.* Cartersville, 84 Ga. 213; Lott *v.* Waycross, *ibid.* 681; Cartersville Imp. etc. Co. *v.* Cartersville, 89 Ga. 683; Dawson Waterworks Co. *v.* Carver, 95 Ga. 565.

9. As the judge was not authorized to direct a verdict for the plaintiff on the ground that the contract was valid and therefore the amount due thereon should be paid according to the terms thereof, the question arises: Was the evidence of such a character as to demand a finding in favor of the plaintiff upon the theory that the defendant had received benefits from the contract during the year 1895 and was for that reason liable for the amount stipulated in the contract to be paid annually? After a careful examination of this record we cannot say that the evidence demanded this finding. While the great preponderance of the evidence is in favor of such a finding, there is some evidence upon which a jury could base a finding in favor of the defendant, and we think that the case should have been submitted to a jury under proper instructions. If the jury should believe that the city council of Dawson maintained its fire department intact during the year 1895 without any substantial change as to its organization or rules from what it had been in previous years, and had failed to notify the officers and members of this department of its intention to abandon the contract with the waterworks company, and also failed to provide any appliances or means to extinguish fires independently of the water which would be furnished by the waterworks company, and did in fact during the year in question make use of the water of the plaintiff company to extinguish a fire or fires, they would be authorized to find that the resolution passed in 1894 terminating the contract with the waterworks company at the end of that year, even if passed in good faith was not adhered to in good faith, and that the acts above recited if true in fact, amounted to a

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waiver of the resolution, so far as payment of the amount due under the contract for 1895 was concerned. If, on the other hand, a jury should believe that the resolution terminating the contract was passed in good faith; that the city authorities did all in their power to carry it into effect; that they notified the officers
732 and members of the fire department that the contract was terminated and that the water was not to be used, and persisted in its refusal to use the water or to permit anyone to use the water in behalf of the city on any occasion, a verdict in favor of the defendant would not be without evidence to support it.

Judgment reversed.
All the justices concurring.

SIMMONS, C. J., specially:

This court having held, when this case was here before, that the contract between the city and the waterworks company created a debt, I am bound by that decision. It is the law of this case, whether it was right or wrong. The majority of the court having determined not to overrule the cases on the same line, I am likewise bound by them. If it were an original question, I should hold in accordance with nearly all the other courts of the Union, including the Supreme Court of the United States when construing similar provisions of constitutions or statutes, that the making of a contract or agreement by municipal authorities for the supply of gas or water for a term of years, for a certain sum to be paid annually, is not a debt within the meaning of the Constitution. It is difficult for me to understand now after full argument and reflection how the making of the same contract by the same authority for one year, when there is no money in the treasury to pay it, and taxes are to be levied to meet the obligation, is not a debt when if the same authority makes a contract for the same purpose for two years or five years it is a debt.

733 Clerk's office, supreme court of Georgia.

ATLANTA, GA., *May* 20, 1899.

I hereby certify that the foregoing pages hereto attached contain a true and complete copy of the opinion of the supreme court of Georgia in the case therein stated.

Witness my signature and the seal of said court hereto affixed the day and year above written.

Z. D. HARRISON, *Clerk.*

Ten cents revenue stamp (cancelled)

[Seal Supreme Court of the State of Georgia.]

734 *Minutes of the City Council of Dawson, May 3, 1886.*

Extract from minutes on page 74.

A motion was made and carried that a regular call meeting of the city council of Dawson be held on Monday night, May 10, to take action in regard to paying for fire engine or to pass an ordinance legalizing this debt against the city, also to take in consideration the question of waterworks cor the city. Confirmed June 10, '86.

W. R. BALDWIN, *Mayor.*

May 10, 1886, extract from minutes on page 75.

A motion was made and carried that the question of incurring expense of waterworks be submitted to the citizens of the city, and that notice of an election to be run in the Dawson Journal, for the time prescribed by law, and that an election be held on said question on the 11th day of June next, 1886.

Confirmed June 10, 1886.

W. R. BALDWIN, *Mayor.*

Call meeting, city council of Dawson, page 78, July 18th, 1886.

The certificate of an election held in the city of Dawson, on June 11, 1886, on "Waterworks" or "No waterworks," for said city, the result being in favor of waterworks, was presented and the same was received, and ordered to be made a matter of record.

In regard to the question of waterworks, Alderman Lowrey submitted two plans: First to put a ram in creek and force water into town. Second. To confer with C. R. Road to build a well, giving $1000. on part of town.

A communication was read from parties in Thomasville in regard to plan suggested for waterworks.

735 Messrs. Lowrey, Melton and Hood were appointed as a committee to confer with fire company in regard to waterworks and devise some plan to furnish water without too much expense. In regard to building a town fire engine house, same was referred to F. committee for action.

W. R. BALDWIN, *Mayor.*

August 2nd, 1886.—The minutes of the last meeting were read and confirmed. The following report from committee on waterworks was read and adopted:

DAWSON, GA., *Aug. 2nd*, 1886.

To the hon. mayor and city council of Dawson, Ga.

GENTLEMEN: Your committee appointed to examine into feasibility of erecting suitable waterworks for our city, beg to submit the

following: At the present time we do not think our people are prepared for the enterprise. Our treasury is depleted. We have outstanding debts already contracted, which must be met. Internal improvements in the way of street and bridge work demand all of ready cash; and we think it would be unjust to our citizens to burden them with a tax sufficiently heavy to insure respectable waterworks. To place the engine at the artesian pump at a prime cost of $400 or $500, and an additional cost of one or two dollars for each day while it is run, merely for the sake of pumping a constant stream of water to run off in waste, seems to your committee to be an expensive folly. When to erect a costly tower, with cistern, pump and piping attached for the purpose of furnishing the business part of town with a water supply, seems to us unjust discrimination.

To run pipes through all the important streets for the purpose of furnishing water to private families, would involve an expense too burdensome to be borne, and would place your committee under the ban of deserved censure by the tax payers of our town. Be-
736 sides this, the pump as now arranged is convenient for the use of those who wish to enjoy artesian water for health purposes, a few strokes being sufficient to bring up the life giving fluid in abundant quantity. In view of all the surroundings we would recommend that the erection of waterworks be indefinitely postponed.

Respectfully submitted,

J. W. F. LOWREY,
B. H. HOOD,
R. L. MELTON,
Committee.

Page 82. DAWSON, GA., *July* 29, 1886.

To the mayor and aldermen of the city of Dawson.

GENTLEMEN: We, as a committee, appointed by Protection Fire Company No. 1, respectfully ask that you have built at your earliest convenience following cisterns, at or near places named below:

1. Near S. V. Brown's shop. 2. One on street running from Judge Rodger's by the Baptist church and near the church. 3. One near A. J. Carver's residence. 4. One near M. E. church on Main street. 5. One wooden cistern between the last named and creek, so that water can be run from creek and fill cisterns; and also that you have hose tower built for the better protection of hose. Also furnish us with 600 feet hose in addition to what we have. We would respectfully suggest that if you grant our request that you employ none but experienced and responsible contractor in building the cisterns.

Respectfully,

C. DEUBLER,
A. J. CARVER,
A. J. BALDWIN,
W. B. CHEATHAM,
Committee.

Page 83. The following parties were appointed committee on cisterns, viz: Aldermen Lowrey, Kaigler and Melton. A motion was made and carried that the finance committee have power to borrow money for city purposes. The following resolution
737 was introduced by Alderman Kaigler: "Whereas, the citizens of Dawson have by their vote at an election held authorizing the city council of Dawson to supply the city with waterworks, and whereas, a majority of said council report adversely. Therefore, be it resolved that the city authorities carry out (page 84) the authorized instructions of said citizens by supplying the city with water from artesian well, either by steam or wind-mill, as said council may deem fit and proper without delay.

Approved Sept. 6, 1886.

WILLIAM R. BALDWIN, *Mayor.*

Page 85. Regular meeting of the city council of Dawson, September 6th, 1886.

The first business transacted under the head of unfinished business was the resolution of Alderman Kaigler in regard to carrying out the instructions of the citizens of the city at an election held authorizing the city council of Dawson to supply the city with waterworks. The same was voted upon and rejected. Aldermen Lowrey, Hood and Melton voting yea*a* Aldermen Kaigler, nay and Alderman Kendrick, not voting.

Confirmed October 4, 1886.

W. R. BALDWIN, *Mayor.*

Page 87. Regular meeting city council of Dawson, October 4, 1886.

Alderman Lowrey reported that the hose tower had been completed, which report was received.

Confirmed.

WM. KAIGLER,
Mayor pro Tem.

738 Call meeting of the city council of Dawson, held Sept. 14, 7.30 p. m., 1894.

Present: A. J. Baldwin, mayor; Aldermen Davis, Lowrey and Dean.

Mayor Baldwin stated that the object of meeting was mainly to consider and take some action relative to the tax asst. for 1894, consider license tax on second hand clothing in case of Alesker and Taubin; waterworks; electric light bonds, and such other matters as might be brought up. All of which was discussed and in consequence of there not being a quorum present action was deferred and meeting adjourned to meet Tuesday night Sept. 18, 1894.

Objected to as being irrelevant and objection overruled.

The MASTER: You can discuss the relevancy of them on the argument.

Respondents then introduced the following letter:

DAWSON, GA., *December 14th*, 1894.

American Pipe Mfg. Co., Philadelphia, Pa.

GENTLEMEN: The contract entered into between the city of Dawson being illegal it will require annual contracts. By direction of the city council of Dawson, I write to know what your company will charge the city council of Dawson for use of water in the same way heretofore used by them from January 1st, 1895. We think the amount heretofore charged is entirely too much per annum, in fact exorbitant. If your company will make reasonable terms, we will enter into a contract with you for one year from January 1st, 1895. If we cannot agree you will please consider this as notice that this council will not longer be liable under your contract after January 1st, 1895.

(Signed) A. J. BALDWIN, *Mayor*.

Objected to as irrelevant.

739 W. R. BALDWIN, sworn by the respondents, testified as follows:

(By Mr. GUERRY:)

Q. Where do you live now?

A. I live in Charleston.

Q. Where were you born and reared and lived up to the time you moved away?

A. Born in Randolph county.

Q. How long did you live here?

A. Lived here about 50 years.

Q. When did you leave here?

A. Left here in December.

Q. Last?

A. Yes, sir.

Q. Who was mayor of Dawson during 1886?

A. I am deficient on dates. I was mayor along about that time.

Q. When the election was had on the question of waterworks or no waterworks, were you mayor?

A. I was mayor.

Q. Had your artesian well been bored at that time or not?

A. There had been two bored and one abandoned; and the other one I don't know whether it had a pump in it or not.

Q. Was there a flow right to the surface?

A. Didn't flow.

Q. I will get you to state what the prevailing idea was here in the city as to what the people were voting for in that election?

A. I don't know what the people in the city knew. It was discussed among the members of council that they might spend five or six thousand dollars in digging cisterns and putting——

Mr. WIMBERLY: Under the rules of law I don't think discussions in the council room between members of council are admissible.

The MASTER: I don't think evidence is admissible of what occurred in matters of discussion; also prevailing opinion. I think it is admissible to show circumstances—surrounding circumstances and facts, if they throw any light upon the issue in dispute.

740 Mr. GUERRY: The reason this evidence is offered, there has been some testimony submitted by the complainant to show that this election was had for the purpose of determining whether they should make this contract with R. L. Bennett & Co.

The MASTER: I do not understand that there is any such claim.

Mr. WIMBERLY: No, we have not claimed that.

Mr. GUERRY: Do you disclaim that?

Mr. WIMBERLY: There is no evidence that Bennett was specified or in contemplation at the time.

Q. I asked you what was the purpose of that testimony, to determine what?

A. It was to get water for the protection of the town—for fire purposes and for drinking purposes, if we could get it without spending too much money.

Q. Do you know about the contract that was subsequently made with R. L. Bennett & Co.?

A. No, sir.

Q. Never heard of it?

A. I have heard of it but have never seen it.

Q. You were mayor when this election was held in '86?

A. Yes, sir.

Q. Had you ever heard of that contract?

A. No, sir.

Q. Or R. L. Bennett?

A. Not at that time.

Q. I am talking about that time?

A. No, sir.

Q. When the election was held in '86, had you ever heard of the contract or any contract of that sort with R. L. Bennett or R. L. Bennett & Co.?

A. No, sir; never heard of it until the present system of water works.

Q. How long was if after that before you knew about it?

A. I don't know. I suppose it was some—might have been 4 or 5 years. I don't remember the time. Probably longer.

Q. Did you ever at any time witness any efforts of persons
741 using the *house* to get a flow of water from the hydrants of this company since the construction of this waterworks system?

A. Yes, sir.

Q. When was that and where?

A. I don't remember the year; but the fire that burned down the dry-kiln. I started.

Q. When?

A. Dodn here by the Methodist church, when the dry-kiln was burned.

Q. Belonging to A. J. Baldwin & Co.?

A. Yes, sir; I started to the fire and I got opposite the plug they were trying to put the hose on.

Mr. WIMBERLY: We think this testimony of the witness is irrelevant and inadmissible under the pleadings as they now stand and under the rules of equity applicable to the case. As I understand it, they propose to show at specific fires something about the streams of water. The court cannot know anything about the surrounding circumstances, what the size of the stream at the particular fire was due to. There is a specific provision in the contract that along the principal streets of the city that a test should be made through 100 feet of hose with a one inch nozzle in still air, and that the water should be thrown vertically in still air 50 feet. That's what it stipulated it would do under the contract.

Mr. GUERRY: I propose to prove by this witness that he saw persons who were using the hose on this occasion, and their efforts to get a flow of water from the hydrant of the said company in that locality; and that the water that ran from the hydrant was half mud; and it was so thick and heavy as at first it barely escaped. There are other things that I propose to prove; but that is what I am seeking to prove by the question now. Of course we will go ahead and show that this was on one of the principal business blocks of the town, where they were trying to use this water.

742 The MASTER: I am going to take this matter under consideration tonight.

The hearing here adjourned until half past eight o'clock the next day.

Third day.

Dawson, March 12, 1902.—The hearing was resumed in Terrell county court house.

Argument of the admissibility of the proof proposed by Mr. Guerry (see page 357), was resumed.

Counsel for complainant cited the following authorities in support of his position:

60th Pacific, 196, Grand Junction Water Works Co. *vs.* The City.

City of Greenville *v.* Greenville Waterworks Co., 27 Southern Reporter, 764.

39 Southwestern Reporter, 768.

Read order for injunction *pendente lite*, on page 58, of the printed record.

After argument the master ruled as appears on page 363 of this record.

Examination of witness W. R. BALDWIN resumed.

(By Mr. GUERRY:)

Q. Mr. Baldwin, do you remember about the fire of the Baldwin & Co. & Geise, oil mills, which was destroyed in '99?

A. Yes, sir.

Q. What month?

A. My brother mentioned it, I didn't remember the date. He said January 11.

Q. You could not state what he did?

A. I don't recollect the date.

Q. What time of the year was it?

A. Along the first of the year.

Q. Were you at that fire?

A. Yes, sir.

743 Q. When you got there how long had it been in progress?

A. I don't know how long it had been burning. Part of the roof had fallen in when I got there, is my recollection.

Q. State whether or not you witnessed the efforts that were then and there made to extinguish that fire?

A. They were playing upon the meal and cake in order to save that, with the hose. A cross arm of the electric light caught fire, and I think Mr. McNulty was one of the parties that had hold of the hose——

Mr. WIMBERLY: I object to his going into this without first showing the number of hose lines used and——

The MASTER: I will let the witness finish his answer;

WITNESS: I called his attention to it and told him that wire arm might burn off and drop down and that wire might hurt some one; and he tried to put it out; and he would have to jerk the hose that way to make it hit or get to it; and it took him sometime to do it. It caught fire again directly and had to do the same thing with it again to make the water reach the arm.

Q. How high was that arm?

A. I don't know exactly. Somewhere about between 25 and 30 feet high.

The MASTER: How is that testimony admissible?

Mr. GUERRY: Shows the failure of the pressure.

The MASTER: Under my ruling, unless you connect that with circumstances showing substantially the same conditions as laid down in the ordinance for the test, I rule that it is inadmissible.

Q. I will ask you whether that flow of water in the hose at that time was weak or strong?

Objected to as leading and does not show——

Mr. GUERRY: Your honor understands me fully: I want
744 to get before you all these points. I am not fighting the ruling of the court at all.

The MASTER: Yes, sir. I will rule that out on the ground that it is too remote and does not illustrate the issue in the case.

Q. I will ask you this question: From what you saw there and from your knowledge of the distances of the way the water was thrown, whether at that time the pressure was strong enough to through the water vertically 50 feet in still air through a hose 100 feet long?

Mr. WIMBERLY: I object to that on the ground that the witness has qualified as an expert in the first place; and he has not shown the facts upon which he bases his opinion; and he has not connected it by showing what the hose lines were, even should he know how long they were, how many there were; how they were located with reference to the system, or anything that brings it up to the contract.

Objection sustained.

Q. Going back to the kiln fire, I will ask you this specific question: When the cap was taken off of the plug, what was the condition of the water?

A. Wasn't—wouldn't any water come out when it was first taken off, solid soft mud. I suppose half a minute, might not have been so long, they had the hose——

Q. Half a minute before what?

A. Before the water came. Commenced coming mud.

Mr. WIMBERLY: Does your honor desire that he shall complete his answer?

The MASTER: I desire that it go down in the record.

WITNESS: I don't remember who had the hose; but I was going to the fire and saw the mud coming out and stopped and looked at it. The hose was about 2 or 3 feet from it when the mud
745 came. They carried the hose on and by the time he got the hose there, I suppose about ⅛ water came and the rest was mud. When it first came out it came solid mud—soft mud.

Mr. WIMBERLY: I object to this evidence on the ground that it

is open to conjecture whether they did not have the hose full of mud.

WITNESS: It was coming out the end of the hydrant. Wasn't coming out of the hose. I didn't see the water coming out of the nozzle at the fire.

The MASTER: I am going to admit that testimony.

Q. What street was that on?

A. It is on Main street, about 100 yards, I suppose, from the public square here.

Q. That one of the principal streets of the city?

A. Yes, sir; principal street in the city.

Q. How far was it from the business center of the city?

A. I suppose it is a block. About 100 yards from the square down here.

Q. From the business center of the city?

A. The business center is up here. I suppose it would be about 200 yards. I don't know the exact distance.

Q. Just at that time, from an observation of the facts and conditions that you then saw, state whether, through a hose in perfect condition 100 feet long, there was sufficient pressure to have thrown water from that hydrant 50 feet vertically in still air?

A. I couldn't say as to that, because the water up here was sufficient to force that mud out. I didn't see them throwing water on the kiln. I don't know how high it would have thrown it. It forced the mud out of the fire plug there. I went to the corner. I didn't go clean down to the fire at all. Before I got there the water was coming out the end of the nozzle but I didn't see the
746 extent of the pressure that was on it. I don't know anything about the pressure that was on the hose at that time, because I didn't see it.

Q. Did you see any water running out?

A. I didn't see the water coming out the end of the nozzle.

Q. I didn't ask you anything about that: I asked you about when you saw it coming out of the hydrant?

A. When I saw it coming out of the hydrant, wasn't any water. It was mud, you understand.

Q. You didn't see any water coming at all?

A. By the time they got the hose up to the plug and screwed it on, the water was gradually washing the mud down that way and it increased in capacity—the water kept increasing in capacity—come from the plug as it would wash the mud down that way; and it increased in capacity. Before they ever got it coupled I ran down to the corner and stopped at the corner.

Q. I understand you say that you have no opinion as to whether it would throw water that day or not?

A. No, sir; I don't know. I don't know how much force there was. I know it had sufficient power to force the mud out.

Q. You were mayor in 1886?

A. Yes, sir.

Q. I will get you to state whether the question of accepting a contract from R. L. Bennett & Co. was ever submitted to a vote—to the voters of the city of Dawson?

A. No, sir; never submitted—never heard of at that time.

Cross-examination.

(By Mr. WIMBERLY:)

Q. Were you mayor in '87?

A. No, sir.

Q. Or '88?

A. I don't remember the year.

Q. I mean was that the year of your election—the year of that election, were you mayor?

A. I was mayor only one year.

747 Q. You were only mayor one year altogether?

A. Yes, sir.

Q. That was in '88, as shown by the resolution?

A. Yes, sir.

Q. You were not connected with the council in any capacity after that?

A. No, sir.

Q. You are a brother of A. J. Baldwin?

A. Yes, sir.

Q. Who was afterwards mayor?

A. Yes, sir.

Q. When you speak of the dry kiln fire, you saw the turning of the water on that fire?

A. I witnessed the connection of the hose to the plug.

Q. I mean turning around to turn the water on, how many turns were made?

A. I don't know how many turns had been made when I got there. I got there, as I say, had the hose 2 or 3 feet from the plug and they were screwing—unscrewing it, turning the water on when I got there. I don't know how much was turned off. The mud seemed to be coming.

Q. Who turned it on?

A. I don't recollect who was at the plug. I don't remember. The mud coming attracted my attention.

Q. You didn't count the rounds that were turned?

A. No, sir; they had turned it some before I got there. I don't know how much.

Q. You spoke of that being the principal street, that end of it is not the principal street?

A. Main street runs clear through town.

Q. The other end of Main street is the negro end of the town?

A. Recently been turned over to the negroes——

Mr. GUERRY: Don't matter about the colored inhabitants.

WITNESS: Those negroes are entitled to protection as well as the white people.

Q. That was the last plug on that street?
A. Yes, sir.
Q. Stopped there?
A. Yes, sir.
Q. That's what they call a dead end?

748 The MASTER: That is certainly a matter of inference.

Mr. WIMBERLY: I don't insist on that and no objection to its being ruled out.

Q. It is removed from the business, generally used, part of the town?
A. What?
Q. It is removed from the part of the city that is the business part of the town?
A. Directly connected with the same street.
Q. The business part don't run that far?
A. The business part does not run that far; but the block this side, 100 yards, business part is.

(By Mr. GUERRY:)

Q. Any warehouse close to it?
A. Warehouse in about—cotton warehouse, I suppose, diagonally across the street from the plug.
Q. How far?
A. I suppose the street is about 80 feet wide. That street is 80 feet wide. Yes, sir; that warehouse is diagonally across the street from the plug where they were coupling.

A. J. BALDWIN, sworn by the respondents, testified as follows:

(By Mr. GUERRY:)

Q. This is Mr. A. J. Baldwin, is it?
A. Yes, sir.
Q. How long have you been a resident of this city?
A. Ever since it was incorporated.
Q. That does not give the time?
A. I have been living here 52 years. I came here six years before it was incorporated.
Q. When were you mayor of the city?
A. Mayor last from '94, '95 and '96, I believe.
Q. You were mayor '94, '95 and '96?
A. Yes, sir.
Q. Do you remember the occasion that the mayor and city council or the action of the mayor and council relative to the
749 abandonment of this contract with the waterworks Co.?
A. Yes, sir.

Q. In August '94?
A. Yes, sir.
Q. '94?
A. It was in '94, but I don't recollect the date of the month.
Q. After that, what notice, if any, did you give the waterworks company?
A. I wrote them a letter at the request of council in December, '94. I don't know whether that's the last letter I wrote them or not. Any way, it was to the effect the contract was illegal; that we had been informed that we could not—council could not contract—one council could not contract for another one to pay without a vote of the citizens; and to know if we could make an agreement with them for water for the year '95.
Q. This letter you refer to is in evidence?
A. Yes, sir.
Q. What notice did you ever give to their superintendent or any officer of theirs?
A. I notified Mr. Horsley in the latter part of '94 or early in January—I think it was in '94, that the city would not be bound for water any more. I also notified Bill Patterson——
Q. Who?
A. Bill Patterson.
Q. This colored fireman?
A. Yes, sir; and R. A. Bishop, who was foreman of Mechanics Fire Company.
Q. Bill was the colored foreman?
A. Yes, sir.
Q. Did you ever notify any of the company except by letter of what you just stated you told Mr. Horsley in December '94?
A. No, sir.
Q. What is the substance of what you told Mr. Horsley on that occasion?
A. I told Mr. Horsley in substance about the letter I wrote.
Q. State now——
750 A. That the city was not bound for the water any more; that we were not going to carry out the contract made by former council; we didn't consider it binding.
Q. What did you tell him council had done with reference to the contract?
A. It had been repudiated.
Q. What did you tell him with reference to whether any water would be paid for or not?
A. I told him council would not be liable for it.
Q. Do you remember Mr. Horsley testifying in the case of The Dawson Waterworks *vs.* The City in the superior court?
A. I recollect his testifying.
Q. Do you remember what he testified to as to that notice?
A. I only remember it from having read it since he testified.
Q. Did that refresh your recollection?

A. Yes, sir.

Q. State the substance of what he said as to what you had told him?

A. He said I had told him——

Mr. WIMBERLY: I submit — read a thing is not the witness' own memory at all, not refreshing his recollection, as I understand it, within the meaning of the rule, being no proof of what he read was correctly taken down.

The MASTER: The witness can state his own memory or own recollection.

Q. Now after reading this and refreshing your recollection, do you remember, and can you state the substance of what he testified on that occasion—after refreshing your recollection, can you without going over the evidence—of course you must not do that, can you recollect after refreshing your recollection say what he testified in substance on that occasion?

A. I know I told him——

Q. Not asking you that?

The MASTER: Let him answer what he was going to say.

751 WITNESS: I know I told Mr. Horsley of this—notified him of it without reading that. I am satisfied he made oath——

Q. Do you remember?

A. I don't recollect distinctly any words he might have said. Could not say positively on that subject except as I said before, he said I did, by reading the evidence. I am satisfied he did it by reading the evidence.

Q. Not asking you about what you are satisfied about. You can't state what you are satisfied, you must state your recollection?

A. I can't state positively that I recollect the words.

Q. To the best of your recollection what can you say as to the substance of his testimony on this point?

A. I can't recollect the words positively.

Q. I didn't ask you the words at all? I asked you for the substance?

A. He swore here I had told him that.

Q. You remember that?

A. I don't know that I remember the words.

Q. The substance?

A. Yes, sir.

Q. He swore that in substance?

A. Yes, sir; remember the substance. I also told others that swore the same thing.

Q. Now you started on to tell what notice you gave Patterson, the colored foreman?

A. I believe it was in '95, there was going to be a tournament in Macon.

Q. What time of the year in '95?

A. Early, perhaps April or May. I don't recollect the month. The colored fire company wanted to attend that tournament and wanted to practice; and wanted permission for him to use that water over here—the hydrant near the Masonic hall. I told him that I had nothing to do with the waterworks, we had abandoned the contract and that he would have to see Mr. Horsley, as he had control of it. Afterwards he asked me for permission to sprinkle the streets and I told him the same thing.

752 Q. Who did?

A. Some negroes here.

Q. The firemen?

A. No, sir; not the fire company.

Q. Firemen?

A. Those were firemen over here. This was to prevent the dust from rising.

Q. Who else did you tell?

A. I told R. A. Bishop, the foreman of Mechanics Fire Company, located near the Variety works.

Q. What year was that?

A. That was in '95 too. Early in '95.

Q. What other foreman was there?

A. I don't recollect that I ever told any others; but on that occasion they had the hose out in town there practicing.

Q. Had you given Patterson notice—was he foreman of the company?

A. Yes, sir.

Q. What other foremen were there besides Bishop and Patterson?

A. I don't recollect who was the foreman of this company up town. Mr. Carver was; but I don't recollect whether he was or not at that time.

Q. Do you remember this election in '86?

A. Yes, sir. June 11, '86, I think it was.

Q. I will get you to state what questions were discussed among the people as to the relation of that election, or what question that election was to settle—what they were to have if it went in the affirmative?

A. They were to have some kind of fire protection with water; but nothing of the kind as the present water works was ever contemplated in that election.

Mr. WIMBERLY: I understood you didn't allow us to go into what council contemplated?

Mr. GUERRY: I understood my brother to go into that question.

The MASTER: I ruled that the intention of council could not be testified to in this way.

753 Mr. GUERRY: You disclaim any proposition to the effect that they voted upon this particular contract at that time?

Mr. WIMBERLY: No, I don't disclaim that. I think the contract

itself shows what they voted on. What I do object to is the competency of the testimony by this witness what council intended.

Mr. GUERRY: I didn't ask that.

WITNESS: Minutes and resolutions——

Q. Don't put your answer in that form; what was discussed, not what was contemplated, among the people in connection with that election?

A. I don't know what was discussed generally. The few I talked to, I didn't talk to everybody around the city; but the few I talked with, it was proposed by some to have a ram put at the creek to force the water up here; by others to put a wind mill over an artesian well.

Q. During that discussion and the pendency of that election, state whether you heard anything in relation to such a contract as was entered into with Bennett & Co.?

A. No, sir; never heard of any such contract.

Q. So far as you could tell, was there any understanding among the people of such a contract as that?

A. There was no such contract as that understood in that election.

Q. What sort of a fire organization was maintained here in the city after January 1st, 1895?

A. Volunteer company here, the same as we had all along.

Q. What control did the city authorities or the city exercise over any organization of that sort during '95, '96, '97, '98 and '99?

A. Didn't exercise authority, though they gave some of them exemptions from street tax. It was necessary to have a fire company to operate the engine and chemical engine we had, even if there was no waterworks.

Q. Did you have any supply of water independent of the
754 waterworks?

A. Yes, sir.

Q. Where was that supply?

A. In the cisterns in the street.

Q. How many cisterns did you have?

A. Six.

Q. When were those cisterns built?

A. I don't know.

Q. Before or after that election?

A. One of them was built before I know. I don't know whether one or two others were built after the election.

Q. Where those who used the water of the waterworks company during the years that I have named, what authority or control—what direction was given the firemen or any of these fire organizations?

A. Well, nothing.

Q. What authority to use the water?

A. Never give any authority to use it. They knew that this contract had been abandoned by my having notified parties——

Mr. WIMBERLY: I object to that answer. He can state what notice he gave, and who he gave it to.

The MASTER: He stated who he gave it to.

Q. So far as the city authorities were concerned, during these years, so far as the city government was concerned, what authority did these firemen or the citizens have to use the water of the waterworks company?

A. Didn't have any authority from the city.

Objected to as being incompetent; and there being an ordinance in evidence requiring the fire department to do certain things; and witness could not give his opinion on what they had authority to do or what they did not.

The MASTER: Ask him the general question as to whether there was any authority.

Q. State what direction or permission the city government gave with reference to the using of this water of the waterworks company by the fire company or the people for the extinguish-
755 ment of fires?

A. If the city ever gave any I never knew it, or the city council. Don't think I missed more than one or two meetings during my term of office.

Q. State whether you as mayor ever gave any such direction or permission?

A. For the use of it?

Q. Yes?

A. No, sir.

Q. After '94?

A. I never did.

Q. State whether you as mayor ever empowered anybody else to give such direction or permission?

A. No, sir; I never did.

Q. Do you remember that chemical engine that was referred to?

A. Yes, sir.

Q. When was that in the possession of Patterson's company?

A. I don't recollect; but they quit using it. They had it on hand for considerable time. My impression is that they used it up to the time the waterworks was put in.

Q. During the years I have inquired about, who has been filling the office of chief and assistant chief of the fire department?

A. I don't remember. I believe Mr. Clark was elected after I went out of office.

Q. That was in what year?

A. '97 I think, I think I was chief in '97. I resigned shortly after the fire that was out at Dr. Kendrick's. I don't know who represented it from then.

Q. Since the beginning of '95, what has been the condition of the fountains?

A. You mean the fountain that stood in the street?
Q. Yes?
A. It was broken down. I think a team ran against it and broke it down in '95 and never has been replaced.
Q. Not used since then?
A. No, sir. The fountain up at the hotel was out of use before the other one was. It stands there now but there is no water in it.

756 Q. State whether or not any reports of the fire companies were made to council during those years I have mentioned?
A. Don't recollect any. Might have been some but I don't recollect it. The minutes will show.

Mr. WIMBERLY: We object to that. They not only made reports but they are now in evidence before the court.

WITNESS: I say the minutes will show. I don't recollect that.
Q. Do you remember any purchase of hose or hose reel after '94?
A. I don't remember; but I understood the city purchased some in '97. We purchased some, 500 feet, in '94.
Q. I am asking you for your own knowledge, not what you heard?
A. I don't know. Purchased some this last year, in 1901.
Q. During these years that I have inquired about, have you attended any fires?
A. Yes, sir.
Q. Going back to the first one since *since* '94?
A. I don't know that I could recollect the dates. I attended all of them when I was in town.
Q. Did you attend any fire in '95?
A. I attended the fire if I was here; but I don't recollect what fires. I think there was one in the bakery that year.
Q. Were you present when they extinguished that fire?
A. Yes, sir. It was in a building, I should think, 10 x 12, 14 feet high.
Q. The building was?
A. Yes, sir.
Q. Do you remember the fire at the lumber kiln in 1896?
A. Yes, sir.
Q. Are you the Baldwin that was interested in that property?
A. Yes, sir.
Q. Were you present?
A. Yes, sir.

Q. Did you see how the water was used—with what suc-
757 cess on that occasion?
A. Yes, sir; I saw how it was used.
Q. What were they doing when you first saw them using the water?
A. Trying to throw it on the kiln.
Q. Had the hose been attached?

A. Yes, sir; the water was then flowing when I saw it.
Q. Flowing?
A. Yes, sir. The kiln wasn't exceeding 25 feet high.
Q. How near was the nozzle to the kiln?
A. Say 20 feet. Finally it got so hot they couldn't throw it——

Mr. WIMBERLY: I object to this testimony in the absence of proof showing that the conditions were the same as those in the contract. There being no proof as to the number of feet of hose, length of the hose, quality of the hose and whether they were leaking or not and how full the water was turned on, and everything else that brings it up to the contract.

Q. What was the length of the hose?
A. I don't know how many sections — were. The distance was about 400 feet from the kiln to the plug.
Q. From the plug?
A. From the plug to the kiln.
Q. I am talking about the hose?
A. I don't know how much hose was used. Now it is 325 feet across a lot and it run diagonally across the lot.

The MASTER: Isn't the purpose of this testimony to go into the subject I have ruled out? Do you desire another ruling?
Mr. GUERRY: I do.
The MASTER: I exclude the testimony.
Mr. GUERRY: Not allowed to go any further?
The MASTER: I will exclude the preceding answers.
Mr. GUERRY: I propose to ask him if the water was thrown as high as 25 feet or could be?
The MASTER: That question would be inadmissible under my ruling.

758 Q. Do you remember the Green and Whitehard fires in '97?
A. Yes, sir.
Q. What property caught afire on those occasions?
A. The Green residence caught first——
Q. What street was it on?
A. On Crawford street, one I think was; and the other was at the corner of Crawford and College streets, is my recollection.
Q. Those principal streets of the city?
A. Yes, sir. There was a house across the street from where these buildings were that looked like it might catch afire; and they wanted to extinguish the fire with it to keep them from catching fire, but they could not put the water on top——

Mr. WIMBERLY: I object to that. They have not brought out yet how many lines were used at that time, the length of the hose line and the conditions. I believe it was brought out by some of our witnesses that the lines reached over 600 feet and over 400 feet and several feet condemned on account of its defective condition.

The MASTER: Complete your answer.

WITNESS: The house was smoking from the effects of the heat of the others and we wanted to wet it with water to prevent it from catching fire but could not throw the water on top of the building.

Q. How high was the top of that building?

A. To the top of the chimney was 24 feet high. I measured it afterwards from the ground; and took a ladder and went up on the house and poured the water——

The MASTER: Do you expect to show that the conditions there were such——

Mr. GUERRY: I will see.

Q. What was the length of the hose?

A. I don't know what the length of the hose was. Some-
759 thing over 250 feet to the house.

Q. Could you reach the house with the nozzle?

A. I mean to the Whitehard house, not the one——

Q. I am asking you about that little one you have been talking about?

A. That would be something over 300 feet, perhaps 350.

Q. What was the length of the hose, over 300 feet?

A. Must have been over 300.

Q. The hose in good condition and all right?

A. So far as I knew they were.

The MASTER: I will sustain the objection to this testimony.

Mr. GUERRY: Your honor rules that out?

The MASTER: Yes, sir.

Q. After these houses were burned, what test did you make as to the strength of the waterworks?

A. A day or two after that, not more than three days I should say, my recollection is that Mr. Horsley told me they were going to make a test and I went with him. He took 100 feet of new hose, furnished by him, I don't know whether the waterworks company furnished it, but he had it in a wagon; and went over there and attached it to a plug.

Q. Over where?

A. Over in front of Mr. Melton's, the same plug that played on these buildings of Green and Whitehard. Had two sections of hose, 50 feet each, new hose attached to the plug, through an inch nozzle and it went barely above the electric light pole.

Q. Was it turned on full?

A. Yes, sir.

Q. How long did you make the test?

A. To decide as to the height of it.

Q. How high did it go?

A. I suppose it went not exceeding 5 feet above the pole.

Q. How high was the pole?

760 A. 25 feet, is my understanding, above the ground.

Q. What is your judgment as to the height of the water?
A. Didn't exceed 30 feet in height.
Q. Was the air still?
A. I can't say it was perfectly still. It was clear enough to make a straight stream.
Q. Usual condition of the air?
A. Yes, sir.
Q. No storms—no great amount of wind?
A. No great blast.
Q. Any interference of the stream by the wind when it was thrown up?
A. No, sir. I believe Mr. Deubler was there. Not certain.
Q. Sir?
A. I think Mr. Deubler was there, not certain, and Mr. Melton.
Q. What year was that?
A. That was in '97—I think it was '97.
Q. What change or alteration had been made in this waterworks from '94 up to that time, that you know of?
A. None so far as I know.
Q. What change had been in the waterworks that you know of, after that test, up to the time this new tank was built?
A. I don't know of any that was made.
Q. Are you familiar with the property—do you know the plant and ground where it is located, the old tank and the new one?
A. Yes, sir.
Q. Why were those Green and Whitchard houses not saved?

Mr. WIMBERLY: We object to that. In the first place we don't guarantee to save houses.

The MASTER: I will ask you how that is relevant?

Mr. GUERRY: My friend tried to show that he saved a great deal. I want to show it was no account.

Q. I will ask you whether those houses burned up or not?
A. Yes, sir; burned as others have that had any headway.
Q. Burned down?
761 A. Yes, sir; think we were able to save a part of the sills.
Q. Do you remember the Grier and McClelland fires in '98 on Lee street?
A. Yes, sir.
Q. What was the length of the hose attached on that occasion?
A. I can't say as to the length of the hose. I know about the distance of the plug from the building.
Q. What was the distance?
A. The street there is 80 feet; and the house sets inside there some 25 feet or a little over—100 feet, I should say, from the plug, excepting the width of the sidewalk.
Q. No unnecessary amount of hose, was there?
A. I don't think there was.
Q. How much hose was attached?

A. I don't know. Would not have been necessary to have had more than 150 feet to have played on it, or could have put on a little more and played on the opposite side of it.

Q. Do you know the amount of hose used?

A. No, sir; I don't recollect the amount of hose.

Q. Do you remember how high the water was thrown on that occasion?

Mr. WIMBERLY: I object to that, because the witness don't know how many feet of hose were used or how many lines of hose.

The MASTER:

Q. What was the size of the nozzle?

A. I don't know the size of the nozzle.

The MASTER: I will sustain the objection.

Q. Did they have one or more lines of hose?

A. My recollection is only one from the east plug. Two plugs, one up at the far end. I can state, if you will allow me—I was going to make a statement——

Q. What is the statement you want to make?

A. Something similar to the one at the Grier and Whitehard, the water poured out——

762 The MASTER: No, don't care to go into that testimony at all.

Q. Did you see any effort made on that occasion with reference to the Rauch residence that adjoins Grier's?

A. Yes.

Q. State what you saw with reference to that——

Objected to——

Mr. GUERRY: We propose to show that they undertook to wet that building, so as to prevent it from catching fire; and that the roof was about 20 feet high; and that the stream didn't have force enough to go on the building so as to wet it. We will ask your honor to rule on that.

The MASTER: Mr. Guerry, any of these fires that you have reason to believe that you can show the conditions were such as are required in the test, of course the testimony would be admissible; but I have ruled several times that testimony will not be admitted, unless you can bring it within the condictions already stated.

Mr. GUERRY: Understand I am doing this for the purpose of getting the full benefit of the exceptions. Not contesting your honor's ruling, I want to get the full benefit of it. I don't want it to appear in the record that I had one or two little instances of this sort.

The MASTER: You may save time by stating what you expect to prove and let it go in the record.

Mr. GUERRY: Very well, sir. I expect to prove certain things by certain witnesses.

The MASTER: Very well, I will take a few minutes recess in order that you may state to the stenographer what you expect to prove; and I will have it read to me and then make a ruling.

Mr. GUERRY: With the permission of the court we propose to prove by this witness (A. J. Baldwin), and certain other witnesses, the following; and we now make these propositions at the
763 suggestion of the court and in order to save time, so that the court can rule upon them altogether:

We desire not to propose all of our proof, but enough of the same to indicate its character and its extent on the questions involved in the proposed proof:

By A. J. BALDWIN, the witness now on the stand, the following: That at the fires that destroyed the residence of F. L. Parks, one in the year 1898 and one in the year 1899. The hose was attached to the plugs of the Dawson Waterworks Company, not over 400 feet away, on one of the principal streets of the city; and the force from the same was not sufficient to do anything towards extinguishing the said fires; and the building in each instance was burned down; that the force or pressure from said hydrants was so weak that those trying to throw the water on the fire could not get near enough to throw the streams on the fires, although they did stand within 40 or 50 feet of the building.

That witness witnessed the fire that destroyed the Dawson oil mill, in Dawson, on the 4th of January, 1899. The mill was in full operation and supplied with 200 feet of standard hose, same kind and size of nozzle as the city's hose. This hose was immediately attached to the Dawson Waterworks Company's hydrant 15 feet from the corner of said mill by the hands and turned on said fire. The pressure of said water was so weak it was entirely insufficient to prevent the burning of said building, although attached and put to work very promptly; and in consequence of said weak pressure thus used, those using the hose were unable to stay near enough to the fire to throw water on it. That the pressure at the time was not sufficient to throw the water over 30 feet high with a one inch nozzle attached to the hose. The mill was on one of the principal streets of the city and one of the lowest points,
764 being ten feet lower — the base of the standpipe of the waterworks company.

Witness saw the fire which destroyed the Farnum house, April, 1898, being near his place of business. Fire caught in kitchen, low one story building, not more than 15 or 20 feet high; and the stream of water from the waterworks did not and could not reach more than 25 feet high on that occasion. Don't know whether the nozzle was ¾ or one inch; but it was one or the other. On this occasion witness was hit by the stream of water with its full pressure in the face while standing within eight feet of the nozzle and suffered no inconvenience from it, except slight strangulation. At the time this happened the nozzle was not more than about 50 feet from the

plug. Witness cannot state the length of the hose. Witness could not state positively what the length of the hose was. It was probably 150 feet. Eight buildings were destroyed on this occasion; and the fire was never checked until the people were able to get the steam fire engine belonging to said city at work, when the flames were subdued by said engine. That from his own experience with fires, he knows that a pressure equal to that agreed to be furnished by the Dawson Waterworks Company, namely, 50 feet vertically in still air, this fire could have been extinguished with the apparatus then in hand and with the hose being used, with slight damage to the hotel and kitchen. Witness was at the fire that destroyed the J. R. Smith residence, May 1st, 1899. The plug to which the hose was attached at said fire was about 400 feet from said residence; and the pressure was not sufficient to throw the stream over a chimney 26 feet and 4 inches high. Witness measured the chimney and saw the failure.

765 Respondent proposed to prove the following by J. S. Lowrey: That after the hose was attached to the hydrants of the waterworks company on one of the principal streets of the city, when an effort was made to extinguish the Farnum House fire, the water could be thrown barely to the top of the kitchen, one story part of the building, not over 22 or 23 feet high.

Respondents proposed to prove by F. M. Jennings, the following: As to the dry kiln fire in 1896, that the stream was never over 25 feet high; and that at the Grier residence, consumed in 1898, the pressure was not sufficient to throw the water to the top of a low one story building not more than 20 or 25 feet high. As to the McClellan fire in 1898, the pressure was not sufficient to throw the stream on a servant's house in the yard, not more than 20 or 25 feet high; and that he saw a man carry the nozzle nearly to the top of said house and pour the water from it. It would not have thrown a stream. Also the Parks fire in 1899, the pressure was not sufficient to throw a stream to the top of the house, it not being more than 30 feet high. And also substantially the same as to the oil mill fire.

Respondents proposed to prove by A. M. Raines, the following: That at the oil mill fire the pressure was so weak that in order for witness to throw the water on end of stable, which was adjoining said property; and it was not more than 15 feet high, witness was compelled to put the end of his thumb over the nozzle so as to make it squirt a small stream on said stable and keep it from catching fire from the heat of the other fire. That said property was on one of the principal streets of the city. Witness was at the Parks
766 fire and in order to prevent the building on the opposite side of the street from catching fire, it was necessary to go on top of the veranda so as to be able to throw the water from the hose on the roof of said building, which was a one story building not more than 20 feet high.

Respondents proposed to prove by E. L. Rainey, the following:

That stream at the Grier fire in 1898 could not be thrown to the top of a one story frame house not more than 20 feet high. That at the Parks fire the stream could not be thrown more than 15 feet high; and that it was necessary to get the water on top of the house, 24 feet high, *to carry the nozzle to the place where needed and let the* water pour out.

Respondents proposed to prove by A. J. Carver, the following: That when the Farnum house burned in 1898, he noticed that the pressure from the hydrants of the waterworks Co. was very poor and inadequate at first but that later the pressure was much better. The cause of this improvement witness is not able to state, as the city's fire engine was soon put in operation and water was pumped from the cisterns of the city as well as from the hydrants.

Respondents proposed to prove by Charles Deubler, the following: As to the Baldwin & Co. & Geise dry kiln fire in 1896, that the pressure was wholly insufficient to throw a stream more than 25 feet high. That at the Variety Works fire the pressure was lacking and the fire engine had to be called into requisition to accomplish anything.

Respondents proposed to prove by J. R. Mercer the following: That at the Parks fire in 1899, the pressure from the hydrants
767 was so inadequate, the holder of the nozzle had to get on top of an adjacent building in order to get water there; and that the water could not be thrown more than 30 feet high.

Respondents proposed to prove by W. F. Locke the following: That at the Whitehard fire in June, 1897, the waterworks company's hydrants were insufficient to throw the water 20 feet away from the nozzle.

Respondents proposed to prove the following by F. E. Clark: That he attended the fire which burned the residence of Robert Smith in Dawson in 1899; and that the pressure was not sufficient to throw a stream over a chimney about 25 feet high at said fire.

Respondents proposed to prove the following by T. L. Guerry: That he was at the Bob Smith fire in May, 1899. That there were about 250 feet of hose attached to the hydrant; and there was not enough pressure to get the water on top of a chimney 25 feet high.

Respondents proposed to prove by C. V. Evarts the following: That he attended the fire that burned the residence of Mr. Hamilton, September 20, 1898, in Dawson. That 400 feet of hose were — use. Fire was within 400 feet of the pumping station of the Dawson Waterworks Company, said county (Terrell), the hose being attached to a plug of said company; and the water could not be gotten from the nozzle to the top of the veranda 12 feet high.

768 Respondents proposed to prove by W. E. Riordan, the following: That he was present at the lumber kiln fire in Dawson in 1896; and that the pressure of the water from the hydrants of the waterworks Co. was not sufficient, during his observation, to throw the water ten feet from the nozzle.

The MASTER: The question now under consideration is not the

effect of this evidence, but its relevancy to the extent of making it admissible. Should the master err in excluding testimony, the result would be to put parties to additional expense, cost and delay; and for that reason I am liberal in my views, that is, I try to be, as to the admissibility of testimony. Nevertheless, if I am clear that testimony is not relevant, and should not be admitted, I feel I should not admit it.

Now the contract in this case provides for the construction of a system according to specifications given; and that there should be erected a reservoir of a certain capacity; and of such a height as to afford a pressure under the circumstances stated in the ordinance. As to the system, it is provided that the system shall be thorough and complete; and that a supply of water for the purposes stated in the contract shall be maintained. I think that imposes on the waterworks company the duty of maintaining an efficient system and of keeping a sufficient supply of water on hand.

Now any evidence showing that this reservoir was not of the required height would be entirely admissible. Any evidence showing that under the test provided in this contract, or under conditions substantially the same, showing that the contract was not complied with, I think would be admissible. I shall permit you to
769 prove that the tank leaked. You may introduce evidence to show, if you choose, and can, that the tank was not kept filled with water. You may also introduce evidence to show, if you can, under these conditions, or conditions substantially like these, that the pressure was not sufficient to raise the water 50 feet vertically in still air. I shall permit you to show that there was a total failure of pressure for a greater or less length of time; and if the failure is total, then there is no pressure.

I hardly think that we can go into the realm of speculation as to what the pressure would be under conditions which vary substantially and materially from those laid down in the ordinance. In other words: Whether the water pressure was weak and continued so for a short length of time under conditions that surrounded the lumber kiln fire. I hardly see how that illustrates the issue at all. I will permit you to introduce evidence to show that the company has not in any respect maintained its system as it should have done. As I have admitted evidence to show that there was a new tank made, I will admit evidence showing that the tank leaked. You may show that the pipes throughout the city were not properly maintained or flushed; and that the source of supply has been allowed to be contaminated; and that the service was improper; I will permit all that; but I don't think I should permit evidence as to what occurred at particular fires under conditions totally dissimilar from those stated in the contract.

Mr. GUERRY: Your honor's ruling, as I understood it, I would like to show in the record, as invoked upon the offer to prove certain facts, which I have stated, by those particular witnesses, your honor rules I cannot prove?

The MASTER: You stated what you expected to prove?

Mr. GUERRY: By way of illustration.

770 The MASTER: In conformity with my general ruling, I will exclude the evidence offered, unless it is proposed to show in connection therewith that there was a total failure of pressure, or that the surrounding circumstances were substantially the same as those laid down in the contract for a test. If you can come up to those conditions you may proceed.

Identified:

W. A. WIMBISH,
Master in Chancery.

Filed in clerk's office 27 April, 1903.

O. C. FULLER, *Clerk,*
By N. A. BROWN, *Deputy.*

771 Examination of witness A. J. BALDWIN resumed by Mr. Guerry, for respondents (recalled):

The MASTER: Do you expect to show that this witness is an expert on this subject?

Mr. GUERRY: No, sir; he has had a great deal of experience with fires and fire engines as a citizen and mayor. I don't know whether he was an expert. I don't reckon he was.

WITNESS: I am not an expert.

Mr. GUERRY: I think the reporter might show that the witness was recalled at this point.

The MASTER: Before going on I will state that I will exclude this proposed testimony that you have completed.

Mr. GUERRY: I thought your honor would allow me to put in all this other.

The MASTER: I will act on it altogether and give you a written ruling in order that you may not have to ask these questions to these witnesses. I will, however, at this stage exclude this proposed testimony.

Q. Do you remember the bursting of the hose at the Mercer stables, referred to by Mr. Kaigler?

A. Yes, sir.

Q. Whose hose was that?

A. Belonged to Baldwin & Co. and Geise.

Q. What condition were they in?

A. It was mildewed and rotten. Didn't discover it until after the fire.

Q. It was not the city's hose?

A. No, sir. I attached the hose to the plug myself.

Q. Do you know about the plant of this company, where its property is located and all the surroundings?

A. Yes, sir. I know where it is located.

Q. What are the conditions of the place there as to cleanliness, mud or growth?

A. I think it is in very bad shape.

Q. In what particulars?

772 A. Well, it has a ditch there that seems to be to carry away a pond above there that has been recently dug to turn the flow of the water of the branch into the pipe that conveys the water to the pumping station—the whole of the stream above comes through and the water is taken from that pumping station. In addition to that, there are nine houses—settlements, on the hill just above the waterworks, eight of which would flow into this stream.

Q. You mean the grounds, lots and where the privies are located?

A. Yes, sir.

Q. Where would the surface water go from all these points—all these eight places?

A. Go down to this stream that supplies the waterworks.

Q. How do you know that?

A. I have seen it. Looked at it. Besides, they have a butcher pen there—located there.

Q. How can you tell that location, do you see any signs of washing?

A. I have seen signs of washing where it washes down in the ditches—places washed out near the swamp it widens out.

Q. Where is that butcher pen located?

A. On the hill west of the stream.

Q. How long have these houses and butcher pen been there?

A. The houses, some of them, have been there, I should think, 12 or 15 years. Some—in fact, most of them have been there that long. The butcher pen has not been there so long, not perhaps, longer than five years. I don't know how long it has been there.

Q. What protection is there for these springs as to the ways through which they flow into the branch—would the branch have above the mouth of the inlet pipe which carries the water into the waterworks?

A. No protection that I could see. The spring flows into the branch—the branch, I suppose, is eight feet across where the

773 spring flows into it. I was there several years ago with Mr. Horsley and they had a plank set across the spring and an inch and a quarter hole in the plank and the water run through; and the water coming out would not more than half fill that hole. The water running there, about eight feet below the spring, the volume is a great many more thousand times——

Q. What volume is that?

A. The volume in the branch I would say is more than a thousand times greater than the spring.

Q. State whether or not there is a creek or branch there independent of these springs mentioned in this resolution?

A. I take this to be independent of the springs. That is, the one that runs into——

Mr. WIMBERLY: I object to this. He was not in council at the time, he was not mayor or any representative of the city that went down there and selected it as the water supply; and his opinion as to whether it is the same place or not is not testimony.

Mr. GUERRY: I am not asking for his opinion. I asked him whether there was a branch there independent of these springs?

WITNESS: There was one.

Objection overruled.

Q. Was there a branch there independent of the springs around there?

A. Yes, sir. Has been recently dammed up and turned into the waterworks supply.

Q. How far does this branch extend up beyond these springs?

A. I have never been to the head of it.

Q. How recently have you seen this property?

A. I saw it this morning.

Q. Did you see any ditches there for the protection of this branch or these springs?

A. No, sir.

774 Q. Did you see any there at all?

A. None except one that was to turn the water from the old run of the creek to the supply.

Q. You mean the inlet pipe?

A. No, sir; this other one outside of the one they call the spring. It has been recently dam-ed up. There is a ditch being widened out.

Q. Where does that keep it out of the branch, above or below the inlet pipe?

A. Takes it out above the inlet pipe for the city water supply.

Q. Does it keep it out of the branch or carry it into the branch the ditch you are talking about?

A. Brings it out of the swamp above and mixes it with the original supply that was intended for the city.

Q. I don't understand you: Are there any ditches there that are put there for the protection of the branch?

A. No ditches there for the protection of the branch.

Q. The ditch that you are talking about, where is that?

A. It is one to turn that creek. It was never intended for the supply of the waterworks—into the water supply. It has been recently dammed up and turned in within the last month. Could not tell exactly.

Q. You mean that is a branch of other water that is being conveyed into the branch they get the water out of for the waterworks?

A. Yes, sir.

Q. That is a stream that naturally didn't flow into the branch?

A. Didn't naturally flow into it. Came around the other way.

Q. Didn't go into the inlet pipe?
A. It was above but never run into it.
Q. Didn't go in above?
A. No, sir; didn't go in above.
The MASTER: *I* don't understand this testimony myself.
Mr. GUERRY: As I understand, there are two streams?
775 WITNESS: Yes, sir.
Q. Do you know anything about the condition of the old tank?
A. I have passed there when the streets were wet; and unless you walked on the other side of the street, when the wind was blowing, you could not pass it without becoming wet.
Q. What was the matter with it, leaking?
A. Yes, sir.
Q. When was that?
A. Shortly before it was torn down, in '97 or '98. Somewhere along there.
Q. How near full did it remain?
A. I don't know. The depth of the water in the tank. It was not overflowing when I saw it.

(By the MASTER:)

Q. Did you see this source of supply at the time it was adopted by the water works company?
A. No, sir.
Q. You don't know what its condition was then?
A. No, sir. It was a swamp then. Never been cut down. The trees have been cut down since then that were in it.
Q. When did you become familiar with this source of supply?
A. Never was over there but once before to-day that I remember.
Q. When were you there before?
A. I suppose it has been five years ago.
Q. Is it different—what is its condition now relatively to what it was then?
A. This plank that I speak of is gone. The spring is filled up level and the water flows over the sand. Then this spring had a reservoir four feet across. Now it flows level with the sand—filled in with sand washed in from above. The water flows over the sand.
Q. You don't know whether these houses were there when the source of supply was adopted?
A. No. Some were there. Were not all there. I passed there—passed on the road, the road runs a little north of west. Doesn't run east and west, runs north of west.
776 Q. You took your observations as to the flow of the water from those houses this morning?
A. Yes, sir; I did. All of them, except one flowed into the creek above the supply besides the washings from the butcher pen.

Cross-examination.

(By Mr. WIMBERLY:)

Q. You spoke of the tank leaking, there was a gauge of the water in the tank open to inspection at all times?

A. Yes, sir; I suppose there was. I don't know.

Q. Don't you know there was?

A. No. There was a gauge in the store but I don't know why Mr. Horsley took it out.

Q. You know there were two gauges down at the pumping station?

A. I don't know there was two. I know there was one. I have not been there a great many times.

Q. You know of another gauge at Mr. Horsley's house?

A. Never seen one there. Been told there was one there.

Q. You did nothing to ascertain the quantity of water in that tank or took the pains to look at the gauge?

A. Except the pressure in the store. I looked at the pressure when he had the gauge in the store.

Q. When was that?

A. That was shortly after putting in the waterworks.

Q. That was prior to '95?

A. Yes, sir.

Q. I am speaking from January 1st, 1895?

A. Not certain. He took the gauge out in '95 or '96.

Q. Since '95—since January 1st, have you taken the pains to look at the gauge?

A. No, sir. I might have looked at the gauge at the waterworks.

Q. Have you any recollection of looking at the gauge since January 1st, '95?

A. Not to make any note of it.

Q. You really don't know anything about the depth of the water in the tank, do you?

777 A. I don't know how deep it stood in the tank. I know, if you will allow me to state it, that on one or two occasions there was no pressure at all.

Q. Since '95?

A. I don't recollect the dates.

Q. Inside of the time you speak of, since January 1st, 1895?

A. I don't recollect the dates I called his attention to it.

Q. You speak about the source of supply there to the time you were mayor: You say you were mayor in '94, '95 and '96?

A. Yes, sir.

Q. Those three years?

A. Yes, sir.

Q. During the time you were mayor did you ever have that water tested any more after that or make any effort to have it tested?

A. I believe I did, sir.

Q. Where is that test: Who did you get to examine it?

A. I got a chemist in Atlanta, I don't recollect.
Q. Have you got that test?
A. I have not got it now. It may be over to the store.
Q. You never notified the waterworks company you tested it or desired to test it?
A. No, sir.
Q. You never notified them of the result of any test?
A. No, sir.
Q. You never asked them to change the source of supply?
A. No, sir.
Q. During all the time you were mayor?
A. No, sir; didn't claim we had any authority.
Q. I am asking you as to the fact?
A. That is a fact, as I stated.
Q. Were you mayor when you had that test made?
A. I don't recollect whether I was or not. I think I was.
Q. You have never at any of these trials, any of the waterworks cases, said anything about that test before?
A. No.
Q. Never apprised anybody as to the result of that test?
778 A. I don't know but what I mentioned it to others.
Q. I mean anybody connected with the waterworks company or their representative?
A. I don't think I ever have.
Q. Any houses on that watershed now but what were there when the source of supply was selected?
A. I don't know but what there are some.
Q. Have you any knowledge on the subject?
A. I never thought of the time they had been there; and never enquired whether they had or not.
Q. When was the first time you made anything like an inspection out there to see what was there?
A. This morning is the first time.
Q. How long were you out there this morning?
A. I suppose we were there three-quarters of an hour.
Q. We, who do you mean?
A. Mr. Lowrey and myself.
Q. The present mayor?
A. Yes, sir.
Q. No one else?
A. No one with us.
Q. Did you go all around the premises?
A. We went up above the springs as far as we thought any water could be obtained for water supply to see whether there would be any doubt as to this water running in from these settlements.
Q. The settlements you speak of, did you measure the distance of these settlements from the swamp?
A. No, sir; didn't measure the distance. Besides from the settle-

ments, there is washings from the road and comes down above the water supply.

Q. The public road—dirt road?

A. Yes, sir.

Q. How far above the water supply?

A. I suppose it is 400 yards.

Q. That is an ordinary, plain dirt road?

A. Ordinary public road. The washings from one side of it goes one way and the washings from the other side goes the other
779 way. There is a hill between the washings. One side of the washings goes south and the other north-east—other goes southwest.

Q. The watershed divides?

A. Divides in the bottom there.

Q. Did you carefully examine all those houses this morning in the three quarters of an hour you were there altogether, to see how much water went towards this branch?

A. Yes.

Q. All of them?

A. Yes, sir; I passed them. It is slanting, on hills, and only one that might have been divided and the privy from that would not have been divided. They are on a slope next to the creek and one of the house's shed would run in below the supply.

Q. You didn't step the distance to the houses?

A. No, sir.

Q. You have an idea as to the distance?

A. Yes, sir; I have an idea.

Q. Never measured it?

A. No, sir. Near as I can——

Q. Won't ask you for your guess, because it can be gotten at by measurement if it should be deemed material?

A. My guesses are usually correct in that line. In the neighborhood of correct.

Q. You ever test any of them to see whether they were correct or not?

A. Yes, sir.

Q. It is a matter of guess work; you took no measurements?

A. Have not had any measurements made.

Q. Never even tried to guess at it until this morning?

A. No, sir. Guessed at a good many other distances though.

Q. I am asking you about this distance now: You testified, didn't you, in the case brought by the city of Dawson—brought by the Dawson Waterworks Co. against the city of Dawson?

A. Yes, sir.

Q. For the hydrant rental of $2000 for 1895?

A. Yes, sir.

Q. You testified on the trial of that case about November '96, wasn't it?

A. I don't recollect the date. I suppose it was about that
780 time.

Q. The first trial of the case?

A. Whatever the date was the record will show.

Q. On that trial you said nothing about notifying Mr. Bishop, did you, of any discontinuance of the use of the water?

A. I don't know that I said anything about it.

Q. Isn't it a fact—let me refresh your recollection: You have read over your testimony since then repeatedly?

A. Have not read it over.

Q. You have not read the questions and answers?

A. Don't know that I have. Don't think I have.

Q. Isn't it a fact that on that trial that the only notice that you spoke of having given to any one, of any discontinuance of the use of the water, was that you said you told Bill Patterson only?

A. He told me that he wanted to get the water for practice and I told him he would have to see Mr. Horsley.

The MASTER: I think it is fa-r to the witness to read him the questions and answers.

WITNESS: I am prepared to answer that. I am satisfied and know I told others besides Patterson.

Q. I am asking you what you testified to?

A. I thought you asked me if I told others except Patterson. I don't recollect what I testified to. I know I told others.

The MASTER: Are you proceeding to show that you didn't so testify?

Mr. WIMBERLY: I am seeking to show at that time he was questioned as to who he told and that was all he mentioned; and that he didn't testify as to the others.

Mr. GUERRY: Was he asked about these others?

Q. Mr. R. A. Bishop was himself present and testified on that trial, wasn't he?

A. I think he was.

781 Q. You did not at that trial state that you told Mr. Bishop anything about it?

A. I don't recollect whether I did or not; but I did tell him.

Q. I am speaking about what you testified?

A. If you have got the evidence it will show it.

Q. What say?

A. If you have it there it will show what I testified to.

Q. You have read it over since?

A. I don't know whether I read it since or not. I read one that Mr. Laing had yesterday.

Mr. GUERRY: Let's see what is in that paper; because that is not a competent question.

Mr. WIMBERLY: I asked him what he testified.

Mr. GUERRY: He has answered that time and again.

The MASTER: He says he does not remember having testified to it.

WITNESS: I don't remember having testified. I did tell them.

Mr. WIMBERLY: I was asking you about what you testified on the other trial.

Q. Isn't it a fact that you were specifically asked to name some of the persons you notified and you stated at the time that you could not name any one except as you stated, Bill Patterson?

A. I am satisfied that is not a fact. It may be but I don't believe it to be a fact.

Q. I believe you say you were mayor in 1895?

A. Yes, sir.

Q. And you were at the bakery fire in February, 1895?

A. Yes, sir.

Q. You say the fire company used the water there?

A. Yes, sir; I say the people used it.

Q. The people who belonged to the fire company who got exemptions—that were allowed exemptions as a fire company?

782 A. I can't state who was there or who were using exactly.

Q. You did say awhile back that you did have a fire company that year and that Mr. Bishop was foreman of it?

A. Yes, sir; necessary to have fire companies.

Q. They were present at the bakery fire?

A. I don't recollect whether Mr. Bishop was there.

Q. The fire company was there?

A. Yes, sir.

Q. You say they used the water from these fire hydrants?

A. Yes, sir.

Q. You told—did you tell anybody not to use them?

A. No, sir.

Q. Did you see the mayor of Dawson there on that occasion?

A. In '95?

Q. Yes, sir?

A. No, sir.

Q. Wasn't he there?

A. He was there. He was seen there by others.

Q. You saw the hose, did you not, after it was attached to the plug—fire plug?

A. I would like——

Q. Of the Dawson Waterworks Company——

A. In saying——

Q. Let me finish my question: You saw the hose through which the water at the time was going and being directed on the fire through a nozzle, one end of it being attached to the plug of the Dawson Waterworks Company and through which hose the water of the Dawson Waterworks Co. was flowing or being thrown on that fire—you saw that hose while the water was being played at the fire in the hands of the mayor of Dawson?

A. I don't think I handled the nozzle.

Q. I didn't ask you about the nozzle, I asked you about the hose?

A. My recollection is that I did take hold of the hose as I did at all fires—as I have at all fires. I attended all the fires that occurred——

783 Q. You helped to pull the hose around while the water was being played on the fire?

A. I don't recollect specially that I did. I know it was my custom at all fires.

Q. Let me bring your attention to it so that I can refresh your recollection?

A. I don't deny doing it.

Q. Didn't you on the occasion that I speak of, testify as follows: The question was asked you: "You were at that fire, that is the bakery fire, in February, 1895, and you saw them using the water, at that fire, out of the fire plugs, didn't you? You answered yes. You were next asked: Didn't you help use some of that water?

A. If I answered yes it is true.

Q. Look at this and say whether you did so at that fire?

A. I am satisfied that I did. I am satisfied at all times I assisted in handling the hose. Even now if I go to fires and I see that it is necessary, I take hold of it.

Q. During '95, '96 and '97, while you were mayor?

A. At any time.

Q. While you were mayor of Dawson?

A. Yes, sir; those three years.

Q. You assisted at fires while you were mayor of Dawson?

A. Yes, sir.

Q. Every fire during those years at which you were present and you were present at most of them, you assisted with the hose in using the water on those fires?

A. If it was necessary for me to do it I did.

Q. I asked you as a fact?

A. I can't recollect every little occurrence at fires for several years back.

Q. You do remember, generally speaking, you were at the great bulk of fires that occurred during those years?

A. I don't remember now but one fire that I didn't attend.

Q. Didn't attend?

A. That I didn't attend while I was here.

784 Q. As far as you remember you attended every other fire but that one during those years?

A. Yes, when I was at home.

Q. And you were generally at home?

A. I was absent at one fire out here in the edge of town. The fire at Mr. Ruggles' house also, back of the Baptist church. I was sick.

Q. With the exception of those two fires you were at the others?

A. That is my best recollection. I tried to get to them.

Q. During the time you were mayor you personally assisted with the hose in using the water of the Dawson Waterworks Co.?

A. I didn't assist as mayor any more than I did when I was not an official.

Q. Didn't you while you were mayor assist at these fires?

A. Yes, sir.

Q. All of them that you attended?

A. Yes, sir.

Q. And used the hose?

A. I don't know that I took hold of the hose on these occasions. If I was there and saw the occasion, I did. I did all I could.

Q. You generally were very active?

A. Always take an active part in it.

Q. More so than otherwise: You helped use the hose?

A. Yes, sir. I did get hold of the nozzle if I could use it.

Q. You knew the water was going through that hose from the fire plugs of the Dawson Waterworks Company?

A. Yes, sir; I knew it.

Q. You had been notified by Mr. Horsley that they expected the city of Dawson to pay for it?

A. If he ever notified me of anything of that kind I never heard of it. I don't recollect, I mean.

Q. You had gotten——

A. I got a letter from Mr. Dawes or Mr. Perot, something of that kind. I recollect that letter. That was not from Mr. Horsley, though.

Q. You remember the letter, don't you: You actually got
785 this letter that is in the record here?

A. Yes, sir.

Q. In which they stated that they expected the city of Dawson to pay for the use of that water?

A. I don't know the words exactly. Copy of it over there. That they would keep up the pressure which would be at our command at all times.

Q. And expected the money?

A. I believe they said that.

Q. You understood they would expect their money?

A. Yes.

Q. After you got that letter did you write them any further as mayor?

A. I don't know whether I did or not.

Q. You don't remember writing them any further letter?

A. I could only tell by referring to dates. What is the date of that letter? I don't recollect the date of any of them.

Q. After you got that letter, during the whole time that you continued to be mayor, after you got their letter notifying you that they would expect the city to pay for that water, you did see that water used and assisted in using it yourself?

A. Yes, sir.

Q. Members of council, during the years you were mayor, they were present at fires too?

A. I suppose they were. I could not tell you any ones present.

Q. You know in a general way that they were present and you saw them at different fires?

A. I know they didn't all attend fires as regularly as I did. I could not recollect who was there and who was not.

Q. They were at a great many fires?

A. I only suppose they were.

Q. You didn't see them?

A. I don't know whether I saw them or not. If they were there I must have seen them.

Q. Mr. Baldwin, during 1895, while you were mayor of the city, the city granted tax exemptions, didn't they?

A. Yes, sir.

Q. And during 1896?

A. Yes, sir.

Q. And '97?

786 A. I was not a member of council in '97. '95 and '96.

Mr. HALL: I submit he has testified to that and has given his reasons for it.

Mr. WIMBERLY: I want to question him on his reasons.

Mr. HALL: He has given his reasons.

Mr. WIMBERLY: I want a little further explanation.

Q. During the time you were giving these members of fire companies—I mean by you, the city, gave the members of the fire company in '95 and '96, tax exemptions, you knew that they were using the water of the Dawson Waterworks Company in putting out fires?

A. Yes, sir.

Q. You knew that they were using the hose, hose reels and the spanners of the city in putting out fires?

A. Yes, sir.

Q. You saw them and you assisted them?

A. Yes, sir.

Q. The hose was repaired from time to time, wasn't it, and new hose bought?

A. They were bought as they were needed. Whenever they needed repairing, they were repaired. Tried to keep them in repair.

Q. Hose can't draw water out of the cisterns and throw it on the fire except when it is attached to a steam engine?

A. I don't know of any one thing that can do it.

Q. What say?

A. I don't know of any one thing that can do it.

Q. Nothing can draw it out of the cistern but an engine or some kind of a pump?

A. Yes sir; other things can do it assisted by steam.

Q. Assisted by steam?

A. Yes, sir.

Q. The steam engine of the city of Dawson was used at very few fires during '95 and '96?

A. Very few, I think.

Q. In fact, during '95 and '96 you had ceased to employ an engineer to run that engine or carry it out to fires?

A. Never did employ one no more than a volunteer.

787 Q. You had no regular engineer during those years to take the engine out?

A. Had the same one, I believe, that we had all along, Mr. Deubler. Never made any special arrangement with him. I believe Mr. Deubler ran the engine in '98.

Q. You had no regularly employed engineer during either of those years?

A. No, sir; not that I know of.

Q. I am speaking of when you were mayor?

A. Yes, sir. I don't know much about the fire companies. I didn't attend the meetings as I had done before.

Q. The fire company down here at the Variety works had no engine at all?

A. No, sir.

Q. The only way they could get the water through the hose was by attaching it directly to the fireplugs?

A. If they could bring it and attach it to the engine it could be used that way.

Q. They had nothing to do with the engine, that wasn't their part?

A. If they would bring it to it they could attach their hose as well as the others.

Q. Your cisterns were not distributed through the whole of the city?

A. No, sir.

Q. Only six in the whole town?

A. That's all.

Q. Three of those were on the Main street?

A. Yes, three on Main street.

Q. After the waterworks company was established in August, '91, the city took no further steps to keep the supply of water of these cisterns in repair, did it?

A. I don't recollect that they did.

Q. The arrangements you had of keeping them full of water were all rotted down and the only way you had in '95 and '96 to get any water in them was the water from the waterworks company, they filled them whenever they got empty?

A. I don't recollect that they filled them then, only what
788 I heard Mr. Horsley say.

Q. You knew there was no other way to fill them?

A. No, sir.

Q. You did know at the time you passed these resolutions about

the use of the water that there was no other way to get water into these cisterns?

A. No, sir; I did know there was other ways.

Q. How many cisterns got their water any other way?

A. Two. One at the Variety shop got water. I don't know how long that was kept up.

Q. In '95 or '96?

A. I don't know whether it was kept up then or not.

Q. What about the other three?

A. After the Robinson house was burned the supply was cut off, my recollection from that.

Q. The supply was cut off by the burning of the house?

A. That supply.

Q. Water from the roof?

A. Yes, sir.

Q. You knew, after these fires, the water that went into these cisterns, was put in by the waterworks company?

A. Yes.

Q. Had no other way of getting in?

A. Except these two I referred to.

Q. Two out of six?

A. Yes, sir. The Variety shops, I think there was a pipe down there.

Q. That Variety shop system was allowed to go down prior to '95?

A. I don t recollect the date it went down.

Q. You didn't see that cistern used at any fire after January 1st 1895?

A. I don't know that I have seen it used at all. I don't know that I have ever seen this one at Mr. Brown's used, or the one over at Mr. Carver's used.

Q. You knew when you were granting these people tax exemptions that they were not using the water from the cisterns?

789 A. They were not used at all then. Didn't know but what they would do it.

Q. The city in '95——

A. Didn't know but what they would use it from the cisterns.

Q. In '96?

A. They didn't have instructions from the council to use the waterworks water.

Q. Didn't have any to use it from the cisterns?

A. No, sir; but they had instructions that the contract had been abandoned. Had no contract with the waterworks Co.

Q. They had no instructions not to use the water at fires?

A. Don't know that they had been instructed not to use it.

Q. In '97? I believe you say you were not mayor?

A. Yes.

Q. So when you went out there with Mr. Horsley you were a private citizen?

A. Yes, sir.

Q. You were neither member of council nor mayor?

A. No, sir. I want to correct a statement made awhile ago. I thought Mr. Deubler was there but he tells me he was not.

Q. Anybody out there in any way connected with the city?

A. Dr. Cheatham I think was there.

Q. Have you any recollections of his being there?

A. No, if he didn't stay until the test was over, I know he passed there at the time.

Q. He didn't go out with you to attend the test?

A. He didn't go with us.

Q. Didn't go out there for that purpose?

A. Don't know what his object was.

Q. Passed there, a practicing physician and passed that part of the town?

A. I don't know what his object was in going out there. He was either there or passed during the time.

Q. Came from the country?

A. No, sir.

Q. Did he take any part in the test?

A. I don't know, sir. He will answer for himself.

790 Q. Did you go out there at the direction of the mayor or council?

A. My recollection is that I went out at the invitation of Mr. Horsley.

Q. You didn't go out at the direction of the mayor or council? You didn't actually measure the height of the stream, did you?

A. No, sir; except by the pole.

Q. Did you measure the pole?

A. No. The length of the pole is said to be 30 feet, five feet in the ground, leaves 5 feet above the ground.

Q. Understood to be; you don't know that of your own knowledge?

A. I never measured one.

Q. You made a rough estimate that it was five feet high?

A. Don't think it was a rough estimate. I think it was a very fair estimate.

Q. Didn't have any system to measure it?

A. I didn't take any actual measurements.

Q. That is the last block on what they call a "dead end"?

A. College street. I don't know whether it is a "dead end" or not.

Q. The pipe stops there?

A. I don't know whether it has any outlet—side outlet.

Q. Did you go back and test any of the others there on the same main?

A. No, sir; I did not. It was not done at my suggestion.

Q. Ain't you mistaken about its being done by Mr. Horsley's suggestion?

A. Not mistaken as to my being there at his suggestion. He furnished the hose. I don't know where he got them.

Q. You don't know whose hose it was?

A. I don't know whose it was. I was told that it was the water-works hose.

Q. At no time when you were mayor had any test of the water been made by the city or in behalf of the city?

791 A. None that I know of.

Q. If any test was ever had or complaint made by the city or any one in behalf of the city after you were mayor, you don't know anything about it, do you?

A. No, sir. During the years of '95 and '96 while I was mayor we had no contract with the city.

Q. Not asking you about what contract you had——

Mr. WIMBERLY: I object to that answer and asked that it be ruled out.

The MASTER: I think it is admissible for him to explain that he had no contract.

WITNESS: We considered that we had no contract with them and didn't order it. In fact didn't know we had the right to order it.

Q. You never at any time saw any water thrown through 100 feet of hose for the purpose of seeing how high it could go during any of these years other than the occasion you spoke of out here, that one occasion?

A. No, sir.

Mr. WIMBERLY: I believe no fires have been ruled in. No specific fires?

The MASTER: No.

Re-direct-examination.

(By Mr. GUERRY:)

Q. When was it you say that you saw there was no pressure?

A. I could not recollect the years.

Q. Don't recollect the time specifically: Can you give any idea at all: Was it since '94?

A. I believe it was before '94, the first time I called Mr. Horsley's attention to it. Had water in the upper story of the store and it wouldn't run out.

Q. After that when was it?

A. I don't recollect the dates, whether it was since '94 or '95 or not.

792 Q. Don't know whether it was '95 or not?

A. No, sir. I don't recollect but two occasions that I went and called Mr. Horsley's attention to it. He told me that he noticed it at home on the same occasion.

Q. This test that you were asked about, when was that made?

A. Two or three days after the Green and Whitehard fire.

Q. Not talking about that. Talking about the analysis of the water—test of the water?

A. I don't recollect the date of it.

Q. About what year was it?

A. It was either '94—not certain about the date of it.

Q. Where did you get the water?

A. Got it out of the hydrant in the store—Baldwin & Co.'s store. I can get the date of the letter, I think, over at the store.

Mr. WIMBERLY: The analysis you mean?

The WITNESS: Yes, sir; I think I can get it.

Q. On these occasions when you were helping at the fires, did you act as mayor or as A. J. Baldwin?

Objected to as being incompetent and inadmissible.

The MASTER: I think that is an inference from the fact, whether he was acting as mayor or as an individual. I don't suppose it is any part of his official duties to attend fires and hold the nozzle.

Mr. GUERRY: I want to show that he was acting in an individual capacity. As I view it, there is an issue on that point as to the capacity in which he was acting. I don't think the witness can testify to the ultimate fact which constitutes the issue. As I say, his duties as mayor are prescribed; and I don't understand that there is any contention that he was acting in the discharge of his duties as mayor. The fact is that he was mayor and took part in the fires.

793 Q. You acted then like you acted while you were not mayor?

A. Just the same.

Q. You acted like other people acted who didn't belong to the fire department—didn't belong to the city government?

Objected to as leading.

WITNESS: I didn't act altogether as a great many citizens do. A majority of them stand and look on.

Q. Those that do act?

A. Yes, sir. I took part in them always, not as an officer, but as a citizen.

Q. On these occasions, Mr. Baldwin, since '94, when the people here have been putting out fires, I will get you to state who participated in the efforts to put out the fires?

A. The people generally turned out and took hold.

Q. Who did the work, the people, firemen or whoever wanted?

A. The people generally, not the firemen alone. Fully as many, if not more, of the citizens took hold of the hose and helped around. Never hesitated to help when I was standing around if I saw the need of it.

Q. You had fire companies before you had waterworks?

A. Yes, sir.

Q. Did you have exemptions before you had waterworks?
A. Yes, sir.
Q. Did you have any apparatus before you had any waterworks?
A. Yes, sir.
Q. What apparatus did you have?
A. Hose, steam engine and chemical engine.
Q. Did you have any apparatus after you had the waterworks that you didn't have before, that is, any different kind?
A. I don't know of any different kind, except this recent paid fire department, you understand.
Q. Up to the time you got the paid department: How long has that been going on?
A. The paid fire department?
794 Q. Yes, if you know?
A. I believe it was started in '99, I don't know. I can't recollect. Only a short while. A year, possibly.
Q. I believe you stated that you generally almost universally attended fires when you were here, except on one occasion you were sick, during these years?
A. Yes, sir.
Q. Have you known of any occasion during that time when 100 feet of hose could be used for the purpose of putting out fires—properly used?
A. No, sir.

Objected to as irrelevant and incompetent.
Objection overruled.

Q. State whether during all these fires you have known the length of hose on the occasion where it could have been properly used 100 feet?
A. I don't know of but one instance that as small amount was used then. That was at the mill in April, 1898. I don't think I ever saw an occasion besides that. I don't know that it was only 100 feet used then.
Q. What is your recollection about how much was used then?
A. I think three sections on that occasion, at the time I speak of.
Q. 150 feet?
A. At the time I speak of being struck in the face with the stream.
Q. When the fire was finally put out—when the gin and mill was burning, how did you finally put it out?
A. Put it out by the stream from the engine.
Mr. WIMBERLY: Which fire are you speaking about?
A. The fire that burned the hotel. It wasn't extinguished and the mill and gin caught afire—I mean the top of the mill house caught fire and the Variety shop just west of the store. The gin caught fire and that was extinguished with a bucket of water. The top of the mill was burned off and that was put out with the stream from the fire engine.

795 Q. How long was that fire going on?
A. I suppose the fire was two hours' duration.
Q. How many streams were used at that fire?
A. I don't know how many were used.

The MASTER: What is the materiality of this evidence?

(By Mr. GUERRY:)

Q. How far apart are the hydrants?
A. Different distances, I think. I don't think there is any specific distance for them to be located.
Q. Not asking you about specifications: How far apart are they—how close are they?
A. There is a hydrant in front of the store and one back of the mill, which is 350 feet. Down the street here is another one, I should say about 250 feet; one up in front of Mr. Lowrey's, something like 300 or 350 feet.

Dr. J. G. DEAN, sworn by the respondents, testified as follows:

(By Mr. GUERRY:)

Q. Were you a member of the council in 1894?
A. I was.
Q. Do you remember about the renunciation of this contract?
A. I do.
Q. I will get you to state the causes which led to that action on the part of council?

Objected to as irrelevant, incompetent and the resolution itself speaks for itself.

The MASTER: I think it would be proper to let you show the facts and circumstances at the time, but not to ask for opinions and discussions of council.

WITNESS: In the first place we regarded the inefficiency of the waterworks, not what it ought to have been when it comes to a matter of fire protection——

796 Mr. WIMBERLY: I object to what they regarded.
The MASTER: You may show there was dissatisfaction.

Q. Do you know whether notice of dissatisfaction was known to Mr. Horsley, the superintendent?
A. I don't remember now whether we gave him any special notice or not. I was a member of council here and was conversant with the fact of the dissatisfaction of the—with the contract, etc., the sanitary condition of the water for domestic purposes, etc.
Q. Did Mr. Horsley know about it in any way?
A. I don't see how he could keep from knowing it. Talked among ourselves and talked by other people. Nothing to keep him from knowing it. I don't remember telling him. Could not say whether any one else told him.

Q. State what you know about the condition of the water?

The MASTER: I think that testimony is inadmissible as it comes from the lips of the witness at this point.

Q. What about the water during that time—about its condition—fitness for sanitary purposes?

A. A large part of the time it has not been fit for use. Muddy and *contaminated*.

Q. During the year '94?

A. Yes, sir.

Q. How do you know that?

A. I used it at my house—residence. I have waterworks. Bath room, and so on.

Q. You are a practicing physician?

A. I am.

Q. Have been since when?

A. Since '85.

Q. What was the condition of this water—what was the matter with it?

A. It was very frequently muddy and not fit for bathing purposes.

The MASTER: You are asking him about the condition in '94?

Mr. GUERRY: And later.

The MASTER: I will admit it as to later on, subject to my ruling. The water was paid for in '94.

797 Mr. GUERRY: That is not the question. We want to prove the condition of the water. The fact that we paid for it don't show whether it was clear.

The MASTER: I don't think that is an issue in this case.

Q. In '95, what was its condition then?

A. Same condition existed. If anything it grew worse.

Q. State what its condition was without reference to '94. That is ruled out.

A. The condition as I described, frequently muddy. In dry spells it was clear and apparently very good.

Q. Besides being very muddy, what other things did you detect about it?

A. That was the worse condition of it. I don't remember especially any other condition, except that of being lacking in clearness frequently. A good deal of mud in it evidently.

Q. Fit for drinking purposes in its condition?

A. No, sir. A large part of the time it was not fit for drinking. Never drank it myself at all. I used a well in preference.

Q. When it was in this muddy condition a large part of the time, state whether it was wholesome water?

A. I didn't regard it as such.

Q. Was it fit for drinking purposes?

A. Not as a rule.

Q. It do to cook with?

A. Don't think so. Though I have used it for that purpose but always boiled it.

Q. Were there times in '95 when it was not fit to bathe in?

A. Yes, sir; times when it was muddy.

Q. What was the condition of it in '96?

A. The same thing.

Q. '97?

A. Same thing.

Q. 98?

A. Same thing.

Q. '99?

A. Same.

Q. Now?

A. Same thing. Worse now. Recently I went in my bath room to bathe and when it came into my bath tub it looked like a
798 mud hole.

Q. State whether or not it was thick or colored?

A. Seemed to be decidedly muddy.

Q. Fit to drink or take a bath in?

A. No, sir.

Q. Or use in cooking?

A. No, sir.

Q. What do you know about the question of amount of pressure?

A. I know it lacks or lacked very much in that respect.

Objected to.

Mr. WIMBERLY: I don't think he can give his opinion in a general way. That is going into the very thing I understood your honor to rule out.

Q. State what you mean—go into the details?

A. I have attended fires and seen the results.

Q. What fires did you attend?

The MASTER: Doesn't that come under my ruling?

Mr. GUERRY: Yes, sir. I will submit it in another way.

The MASTER: I much prefer that you will.

Q. Do you know what the height of the old tank was?

A. From the ground to the bottom of the tank was 59 feet and seven inches.

Q. How do you know that?

A. Mr. Baldwin and I measured it.

Q. Do you know the condition of it for several years before it was torn down?

A. Yes, sir. Leaked badly. Never possible to fill it entirely, at least for several years before it was torn down. Might possibly by pumping all the time get it full.

Q. State whether it was generally kept full during these years?

A. No, sir. I don't see how it could have been, it leaked so badly. It was kept possibly two-thirds or about three-quarters full.

Q. Do you know about the present tank?

A. Yes, sir.

799 Q. About the condition and size of that?

A. I don't know the size of it. I know it is about 40 feet higher than the other, I suppose, from the way it looks.

Q. Just from seeing it?

A. Yes, sir.

Q. You have not measured it?

A. No, sir.

The MASTER: You say the old tank, it was about 59 feet from the bottom of the tank, from where?

A. From the ground to the bottom of the tank? Yes, sir. 59 feet and 7 inches.

Q. Do you know how the old tank itself was?

A. Do not. It seems to me it was about 25 feet deep—20 or 25 feet.

Q. You never measured it?

A. No, sir.

Cross-examination.

(By Mr. WIMBERLY:)

Q. When did you and Mr. Baldwin measure the height of it?

A. I could not tell you just when we did. Did it before it was torn down. Not very long before it was town down. We heard that they were going to tear it down and put up a new one and in order to know the distance from the ground to the tank, we measured it.

Q. Did you measure from the ground level or the top of the foundations?

A. Directly under the tank from the ground, under the tank straight up. Near as we could make it.

Q. The ground or the foundations on the ground?

A. It was within the foundations.

Q. From the foundations wasn't it?

A. No, not from the top of the sills. It was from the ground level.

Q. The earth inside?

A. Yes, sir.

Q. The level of the earth on the inside?

A. Yes, sir; inside right under the tank.

Q. You did not measure the height of the tank itself?

A. Did not.

800 Q. You spoke of how full it was, did you ever examine into it to see how full it was?

A. Only noticing. Saw the condition of it and how badly it leaked frequently. When the water got to a certain extent it run out.

Q. You never went up to the gauge to see how full it was?
A. No, sir.
Q. All of the gauges were open to public inspection?
A. Heard so.
Q. You never inquired or tried to look at the gauge to see how full it was?
A. No, I would not have known how to tell, unless I made inquiry.
Q. You never tried to get up on top and look in to find it out?
A. No, sir.
Q. Guessing at it?
A. Guessing at it from the point where the water was running out.
Q. Where you saw it leaking?
A. Yes, sir. The higher it got the worse it leaked.
Q. You speak of its being muddy recently, that was during the freshet we had here?
A. Muddy always most every rain, if it rains for any length of time.
Q. Any freshet?
A. No, sir; it does not take a freshet?
Q. Unusual?
A. A good deal of rain.
Q. Rainy spells?
A. Rainy spells. It has happened frequently.
Q. You ever make any attempt to have an analysis made?
A. I have not.
Q. Never tried to have it done while you were in office?
A. No, sir.
Q. You testified on the first hearing of The Dawson Waterworks Co. *vs.* City of Dawson, in November '96?
A. I gave testimony that was copied in a book.
Q. You did not at that time or up to that time ever com-
801 plain of the character of the water, did you?
A. I don't know—yes, I made—I didn't complain to the waterworks company, no, sir.
Q. The city did not make any such defense and you didn't testify at that time—had no claim or contention of that sort?
A. I don't think that particular claim was put in at the time. It was recognized by all of us.
Q. I mean in your case?
A. I don't remember whether it was put in as an issue.
Q. You were present when the case came up on another trial in July, '98, were you not, also a witness?
A. I don't remember to have been on this stand before.
Q. You were present in court if you were not put up as a witness at that time?
A. Yes, sir; I think so.
Q. You were a councilman at the time?

A. Yes, sir.

Q. No such contention was made at that time as to the quality of the water?

A. I don't remember that there was.

Q. Isn't it a fact that if there was any pleading of that sort there was no effort to sustain it by any testimony at either of those trials?

A. I don't remember myself.

Q. You say you were a member of council in '94 and also in '95?

A. Yes, sir.

Q. '96?

A. Yes, sir.

Q. '97?

A. Yes, sir.

Q. '98?

A. Yes, sir.

Q. '99?

A. Yes, sir.

Q. And 1900?

A. Yes, sir.

Q. From '94 continuously to the present time?

A. Since Aug. 1893.

Q. From that time and while you were a member of council you attended fires, didn't you?

A. Yes, sir.

Q. You saw the water used by the fire companies, didn't you?

802

A. I saw the water used by any and everybody.

Q. You saw it used by the people that the city had given exemptions to, the fire department, didn't you?

A. Just as individuals.

Q. Did any of those persons that got fire exemptions from the city, as members of the fire department, use the water at those fires?

A. Yes, sir; no effort made to keep them from using it.

Q. You were present and saw it?

A. Yes, sir.

Q. Other members of council were present at those fires and saw it?

A. I think so, yes, sir.

Q. Never forbid them using it, so far as you know?

A. Not strictly.

Q. Used the city's apparatus at these different fires?

A. Yes, sir.

Q. The apparatus kept in the buildings belonging to the city?

A. Yes, sir.

Q. They were returned there after the fire?

A. Yes, sir. Returned usually by anybody. It was brought into service for that purpose.

Q. Returned there by the people that had been exempt—that had their exemptions as members of the fire department?

A. Them and others.

Q. The city during that time brought new hose from time to time?
A. Yes, sir; I suppose so. Bought them 2 or 3 times.
Q. During these years—I speak of '95 and '96?
A. Yes.
Q. And so on?
A. Yes, sir.
Q. You furnished no different water supply after January 1st, 1895? You used just what had been furnished prior to that time?
A. No, sir; had the same arrangements we had before.
803 Q. Same during the year '94?
A. Yes, sir.
Q. And '92 and '93?
A. Yes, sir; all along.
Q. At how many of those fires was the fire engine used?
A. Well, I don't remember. The fire engine was not really at but a few of them.
Q. Not over 2 or 3, was there?
A. I think not.
Q. When the fire engine was used, it drew its water from the hydrants—the fire plugs, didn't it?
A. I suppose so. I don't remember distinctly now about that part of it.
Q. The chemical engine was never used after January 1st, 1895, at fires?
A. I think not.
Q. You never saw any water used at any fire after January 1st, 1895, except the water from the fire plugs of the Dawson Waterworks Company?
A. Well, I don't remember positively.
Q. Did you, as a member of council, see the letter written by the Dawson Waterworks Co., in the record here, in Jan'y, 1895, in which it was stated that they would continue to furnish the service and would require the city to pay for it?
A. I expect so. I don't remember now that letter. I remember one in reply to Mr. Baldwin when he wrote them.
Q. The letter in reply to Mr. Baldwin, it will speak for itself.
A. He wrote them that we would renounce the contract and they expected to carry it to the United States Supreme Court, something of that sort.
Q. You don't——
A. I could not say whether I saw it or not. I don't remember.

Mr. WIMBERLY: I will ask your honor to rule out the contents of that letter. I don't think it is competent.

Q. Doctor, are you a chemist yourself?
A. I make no such profession.
Q. You never made any analysis or attempted to make any analysis of the water yourself, did you?
A. Did not.

804 Q. During the time you were a member of council you were a practicing physician all the time, were you not?

A. Yes, sir.

Q. Did you think in the interest of the public here, or the health of the community, or the city, or for any reason, have an analysis or attempted to have an analysis of the water made?

A. Personally I did not, no, sir.

Q. Personally or otherwise, either personally or as a member of council?

A. I knew of the analysis that Mr. Baldwin referred to awhile ago.

Q. You knew that was made?

A. I knew that he had sent or would send, something of the kind.

Q. You never had that analysis brought into court on any trial?

A. I think not.

Q. You never submitted it or had it inspected by the waterworks company, did you?

A. That was during one of those long dry spells we had.

Q. This analysis made you have never seen fit to try to use it as evidence?

A. Never used it as I remember.

Objected to as irrelevant by Mr. Guerry.

(The hearing then adjourned until 2:30 p. m.)

Afternoon session.

Respondents proposed to prove by witness Dean additionally the following, which is given the stenographer by permission of the master, as heretofore indicated:

That he saw the fire that consumed the oil works of Baldwin, Geise & Co. early in the year 1899. That said property was in a low place in the city where the pressure would be naturally greater. The structure was very low, single story in part and double story in part and very near the standpipe of said company; and one

805 of the hydrants of said company was right at said property. That the pressure at the time of said fire was very weak, the water being thrown about 20 feet high, not sufficiently high or plentiful to extinguish the fire, the buildings being totally consumed. That on the same occasion he saw parties using the water of the company with the hose and nozzle trying to put out a blaze on a cross-arm of an electric light pole standing near by, said arm not being more than 28 feet above the surface of the ground. That the water would not reach said arm except by flirting the nozzle.

That he was present at the Parks fire in March '99. The pressure was about the same as that of the Baldwin & Co. & Geise fire. On same occasion the single story residence of W. S. Dozier began to smoke, the highest point of said house not being more than 25 feet from the ground. When the Parks' house was afore sparks began

to fly, and in order to protect the house from heat and fire, it was necessary to go upon the veranda of the same and the edge of the roof with the hose and nozzle in order to throw the water upon the top of the house; and then the water barely rose high enough for such purpose. The length of the hose was about 250 or 300 feet with a one inch nozzle.

That he witnessed the fire that consumed the Baldwin & Co. & Geise kiln in 1896. He noticed the flow of the water used from the hydrant on that occasion. The flow was very weak; and the pressure was so inadequate, on account of the heat the parties managing the hose could not get close enough to the fire to make the water reach the same with any considerable effect. Kiln was not more than 20 feet high; and the water did not reach more than half way up on said kiln and could not be thrown on or over the same during time witness was present and noticed what was going on. That he witnessed the Green and Whitehard fire in '97. Parties began
806 with the hose on that occasion to throw the water from the hydrant of said company to extinguish said fire. The water was thick and heavy with mud so that the same was thrown out of the nozzle very slowly and with great difficulty for sometime, falling on the ground immediately after escaping from the nozzle. After the water cleared and was thrown with as much force as possible by the pressure behind it, the stream could not be thrown over or upon the single story house that was on fire, said house being about 20 feet high. An effort made to protect the Whitehard house standing near, but the water could not be thrown upon the same, although it was not more than twenty-five feet high. On same occasion the house of H. H. Blizzard, standing on the opposite side of the street, was smoking, and in order to protect the same, and not being able to throw the water upon it from the ground, although the same was not more than twenty feet high, it was necessary to get upon the back veranda of said building in order to pour the water from the nozzle upon said building and thus save it. That he could not say what the length of the hose was on the different occasions mentioned; but there was no unnecessary amount of hose employed at either one of them.

(See ruling of master on page 363.)

A. J. CARVER, sworn by the respondents, testified as follows:

(By Mr. GUERRY:)

Q. How long have you lived in Dawson?
A. Been here 23 years now.
Q. In '86, what connection did you have with the fire company?
A. I think I was foreman of the fire company at that time.
Q. How long did you remain as such?
807 A. For several years. I don't know when I quit, about the time they built the waterworks, I think.

Q. In '86, when the election took place, do you remember about that?

A. Yes, sir.

Q. What was done by the city on the faith of that election after it was held and the result declared?

A. They investigated the advisability of putting a standpipe here over this artesian well, I think—in fact that's the idea I understood the election was held on, was to get water from this little artesian well out here—little waterworks.

Q. What was done about that?

A. It was abandoned. Nothing was done.

Q. What did they finally do?

A. Made a contract with Bennett & Company.

Q. When was that?

A. About '89 or '90.

Q. Before they got to Bennett & Co., what else was done?

A. On what line?

Q. On the faith on that?

A. Didn't do anything.

Q. Any cisterns built?

A. Yes, had cisterns built, I think, before that election was held.

Q. How many before and how many after, do you recollect?

A. No, sir; I think about half a dozen.

Q. Altogether you mean?

A. Yes, sir; there were 2 or 3—built them along.

Q. At the time of that election was there any settled contract agreed on or discussed?

A. You mean the kind of contract they should make?

Q. Particular contract?

A. Yes, they discussed the idea of making a contract to get water out of this artesian well and putting a standpipe there.

Q. When was R. L. Bennett & Co. first heard of after this election? How long before they made the contract with Bennett?

808 A. Bennett came here with these railroad people. Had a little contract with the railroad folks.

Q. About what time was that?

A. About '89.

Q. That he came here?

THE MASTER: I think it has been sufficiently proven that at the time of this election the contract with R. L. Bennett & Co. was not in contemplation. No issue as to that in the case. I don't think any further proof on that point is necessary.

WITNESS: I heard of the proposed contract with Bennett about the time it was made.

Q. When you learned of the proposed contract did you consent to it or did you object?

A. No, I kicked.

Q. You never did acquiesce?

A. No, sir.
Q. You are a property holder in the city?
A. Yes, sir.
Q. Were you at that time?
A. Yes, sir. Talked with the councilmen about it. Two or three of them I remember. Mr. Rainey especially.
The MASTER: Were you a member of council?
A. No, sir.
Q. How did you make your objection known?
A. Talked to them.
Q. To the members of council?
A. Yes, sir.
Q. Are you familiar with the character of water that has been furnished by this company?
A. Yes, sir.
Q. What has been the character of the water all the while?
A. It is better at times.
Q. As a rule?
A. As a rule it has not been fit for use, that is, for domestic purposes.
Q. What do you mean by domestic purposes?
A. To drink and wash. Can't get the washerwomen to use it to wash the clothes hardly. Don't make them white, you know, got too much mud in it.
Q. Has it ever been very muddy or slightly so?
A. Yes, sir; at times real muddy, after big rains—con-
809 siderable rains. It has a bad odor at times.
Q. How bad, slightly so?
A. Not so offensive you could not stand it, but it was offensive to smell. In fact I bathed in it a few times when I hurried through and got out as soon as I could—washed off as quick as I could.
Q. What years was this—about what time?
A. Been most any year since it has been built, at times.
Q. Is that a common condition of the water or a rare condition?
A. Was not that way—it was pretty good water to wash in. Could not call it a common condition, don't think, still it has never been fit for drinking purposes.
Q. Do you remember having a conversation with Mr. J. A. Horsley, the superintendent, in '97 and '98?
A. Oh, I have had various conversations with Mr. Horsley about the waterworks ever since it has been put in.
Q. At what different times?
A. I don't know, sir. I can't recall them now. I have spoken to Mr. Horsley about the condition of the water.
Q. During these years, '95, '96, '97, '98 and '99, during those years?
A. During one of those years I had a talk with Mr. Horsley and some officers.
Q. Which year, best of your recollection?

A. Could not locate—could not name the year.

Q. How many years ago was it—was it since '94?

A. I think about the time this muss was raised. Time the city quit paying for the water, or soon afterwards.

Q. Well, was it when the dispute originated about paying for the water and the refusal?

A. Yes, sir; about that time.

Q. What occasioned the conversation—where did it occur?

A. I don't know what brought it up. Occurred in my office. Mr. Horsley was in there with some of those gentlemen.

810 Q. Which gentleman?

A. Mr. Horsley tells me—I remembered the names of two of them—remember two of them since talking with him. One was Mr. Hawley and another name Keen; and there was a third one he says named Perot. I didn't remember that name.

Q. What was discussed in that conversation at that time?

A. The fitness of the water for use, etc.

Q. What did he say?

A. I remember part of the discussion. Mr. Horsley remarked that water would purify itself every 70 yards, or something of that sort. I disputed that. Finally Mr. Hawley said it would not do it. Supposed to purify itself every——

Q. What water were you talking about?

A. Talking about the waterworks water.

Q. What did you say to them about the condition of the water?

A. I told them that it was unfit for domestic purposes.

Q. You give them any reason wherein it was unfit?

A. Yes. I told them at times it had a bad odor. In the summer time that water gets very warm—awfully warm.

Q. Mr. Horsley was present at that time?

A. Yes, sir.

Q. You ever talk to Mr. Horsley about the condition or character of it except that one time?

A. Yes, but I could not name the dates.

Q. Since then?

A. Yes, and before too.

Q. Since '94?

A. Yes, discussed the condition of the water and scarcity of the water during dry spells, things of that sort. Sometimes he would tell us to quit sprinkling on account of scarcity of the water.

Q. During the visits made at that time—these conversations, was the condition of the water referred to by you in talking to him about it?

A. Yes, sir; referred to the condition of the water very often.

811 Q. What troubles were specified or mentioned in the conversations?

A. Made to the odor and color of the water.

Q. Did you talk to these other gentlemen and Horsley about the amount of the pressure—the amount of supply?

A. No, sir; I don't remember any particular discussions on that at all.

Q. You were not a member of council?

A. I was a member of council one year. I forget the year. Wasn't after they started in this waterworks business. Never had anything to do with that.

Q. You were kicking about its unfitness for domestic use, were you?

A. Yes, sir. Never used it for drinking at home.

Q. Sir?

A. I have never used it for drinking.

Q. Why?

A. It was not fit.

Cross-examination.

(By Mr. WIMBERLY:)

Q. I understand you to say that you have never been a member of council any time since the waterworks contract was made in '91—in '90 I mean?

A. No, sir. I don't remember when I was in council; but was not there during the making of the contract, anything of that sort.

Q. It was prior to that time?

A. Never had anything to do with it.

Q. You have never been a member of council any time since?

A. I don't think I have. I think it was before that that I was a member of council.

Q. You have been a tax payer?

A. Yes, sir; ever since I have been here.

Q. Large tax payer?

A. No, sir; not large—pretty decent one, yes.

Q. You are one of the largest here?

A. I guess I am now, sir. According to how many are in that circle.

812 Q. One of half a dozen largest?

A. Well, I expect I am.

Q. As a tax payer, did you ever make known to Mr. Bennett, or to the American Pipe Mfg. Co., or to Mr. Dawes or to Mr. Keen, or any gentleman connected with any of these companies before the waterworks were constructed that you objected?

A. I don't know. I don't know that I ever made any kick to any of those people. I thought my kicking ought to be done with our council. I had nothing to do with the contract.

Q. You never made any kick with the people that made the contract?

A. No, sir; I didn't want them to laugh at me. That's all they could have done.

Q. Wasn't all you could do?

A. Was to talk.

Q. Wasn't all you could do in '94 when the city council wanted you to bring a bill of injunction?

—. Saw a remedy, thought I did.

Q. Didn't see any in '94?

A. No.

Q. Who pointed that remedy out?

A. I don't know sir. I don't think it was pointed out to me. I think I discussed it and insisted on it. I think I was the prime mover in getting it brought.

Q. Don't you know that the city council got you to bring that bill?

A. No, sir; did not.

Q. Didn't they pay the lawyer for you?

A. If he has been paid they did it.

Q. You did not?

A. No, sir.

Q. He was a salaried officer, the city attorney?

A. I don't know who brought it. I thought Guerry.

Q. Don't you know that Guerry brought it as city attorney and the city paid him?

A. I don't remember. Guerry was city attorney. Other lawyers besides the city attorney.

Q. Guerry & Laing brought the suit?

A. Probably Guerry brought the suit. Joe was not a big partner then.

813 Q. He was city attorney?

A. He was city attorney on one occasion. I don't remember.

Q. He and Guerry were partners at that time?

A. They were.

Q. At that time?

A. I don't know about that time.

Q. Don't you know you never have and never expect to pay them and that the bill was prosecuted on behalf of the city?

A. Yes, sir.

Q. That is a fact?

A. Yes, sir. I know I would have been willing to have paid my part of it if the city had not paid it.

Q. The city footed the bill?

A. I offered to give $100. or better, if necessary.

Q. The city paid the bill itself and would not let you pay it?

A. I presume so if it has been paid.

Q. You never offered to pay it—did you offer to pay it?

A. Never offered to pay and never paid it.

Q. You knew when it was brought that you would not be called upon to pay it?

A. No, sir; I didn't know that. I don't remember to have known that. I know at the time I was in a frame of mind to have paid my

part of it. I would not have done it on my own hook. I don't think the whole town depended upon my action.

Q. You spoke of this water; did you ever make any request of the city council for any other source of supply—you knew what source of supply it adopted, didn't you?

A. I heard at the time that they were going to get water from a spring. I never went to the spring at all.

Q. You knew where they were going to get it?

A. Yes, above where the waterworks is.

Q. You knew they were going to get it at that creek?

A. No, sir; I thought they were going to get it from a spring.

Q. They——

814 A. I understood they were going to have a reservoir for it.

Objected to as irrelevant by Mr. Wimberly.

WITNESS: I was complaining at these people because they didn't get the water directly at the spring.

Q. When was it you made that complaint?

A. When these gentlemen were here. I could not give you the date exactly. Probably could get it by referring to some books there.

Q. Before or after the works were erected?

A. After.

Q. How long after?

A. I don't remember.

Q. One year?

A. I don't remember whether it was one or five.

Q. Was it before that bill for injunction that you brought?

A. I think it was after that, sir. Understand me I am not positive about that. These gentlemen made a visit here during these years but what year it was I could not say. Mr. Dawes or Mr. Horsley could probably tell you the exact year.

Q. Up to the time you speak of that some gentlemen made a visit down here, did you ever mention the matter of your objections to the source of supply to the city or to the waterworks company?

A. I don't know that I did. I have on various occasions I think, in talking to Mr. Horsley, possibly remarked to Mr. Dawes once, that the springs that they took the water from, got it after it run down across the swamp; that I thought they were going to get it out of a spring—good, pure spring water and shut off the surface water.

Q. Why was it in '94 when you brought your bill that you made no complaint as to the water?

A. I didn't write the bill.

Q. You swore to it, didn't you?

A. Yes, sir.

Q. Signed it?

A. Yes, sir.

Q. Didn't you know what was in it?

A. I presume I did.

Q. Didn't you have any say so as to what went in the bill?

A. I didn't dictate it.

815 Q. They fixed it up, brought it to you and then you signed it, and didn't know what was in it?

A. I had an idea what was in it. I thought all these complaints were in it.

Q. You didn't even read it close enough to know what was or what was not in it?

A. No, sir.

Q. You have been taking this water yourself as a regular consumer every year?

A. Nearly every year. When the waterworks was first erected I had a wind-mill on my place and got my water out of a well. After the erection of the waterworks I tore it down and began taking water.

Q. You kept your well?

A. Yes, sir; it is there but it is not used.

Q. Where did you get your drinking water—where do you get it now?

A. Buy it from this ice man over here.

Q. Buy it every year?

A. Yes, sir. Buy ice every day right along.

Q. How long have you been doing that?

A. A long time. Several years. Used water from this artesian well here for drinking.

Q. You used melted ice?

A. Yes, sir; nearly all the year around now; but up to a few years ago in the winter we would get our water from Mr. Perry's well near me, or this little well in town.

The MASTER: I don't think that is material.

WITNESS: Use this water for stock and sprinkling.

Q. You never had any analysis made of the water?

A. No.

Q. You knew that it was analyzed and found all right?

A. The water from this spring. I heard of it.

Q. This place where they get water?

A. No, sir.

Q. Didn't know that?

A. No, sir.

Q. Never enquired?

A. No, sir. You mean this water that they get was analyzed and found pure?

816 Q. Yes?

A. No, never heard of that. I heard they analyzed the water right from the spring up there.

Q. You don't know where they got it for it to be analyzed?

A. No.

Q. You knew when they were building the waterworks?

A. Yes, sir.

Q. You knew when the contract was published with Bennett about a year and a half before they were built?

A. Yes, sir; knew about the time they were——

Q. You knew between '86 and Feb'y 1890, that the city was making continuous efforts trying to make the best arrangements for a waterworks contract?

A. No, sir; I didn't know they were making continuous efforts. Some talk about it when they had the election and then it kind of died out and then Bennett came along here, a railroad contractor, and got broke—strapped here and began to talk waterworks.

Q. Don't you know that they were looking into the matter—making inquiries?

A. Not from the summer——

Q. From the summer of '86 to Feb'y, 1900 when they finally closed the contract?

A. They were doubtless making an effort occasionally. Never heard a great deal about it for a year or two before they made this contract. It kind of died out. I have been a very busy man and have not kept up with these things—inquiring into them.

Q. You knew that negotiations were going on off and on during that time?

A. Yes, sir; but I never heard of any negotiations with Bennett & Co. They abandoned the idea of putting a tank over the artesian well. Never heard of any negotiations although there might have been some.

Q. You speak of washerwomen: You mean to say that none of the washerwomen have used the water in their yards here?

A. How is that?

817 Q. Didn't you say something about washerwomen?

A. I said you could not hardly get the washerwomen to use this waterworks water.

Q. Haven't got any waterworks water?

A. No. We have our washing done at home and tried to get the washerwomen to use the water in our yard and they won't do it. Say they can't get the clothes white with it.

Q. Uses her own water?

A. No, uses the well in my yard. Lives on my yard. I have got a well back there.

Q. That's the only washerwoman you refer to?

A. That is not the only one I refer to. Every one I have had since the waterworks has been in refused to use it.

Q. You had nothing to do with their refusal?

A. No.

Mr. WIMBERLY: I move to rule out what the washerwomen said.

WITNESS: I thought it was ridiculous that they could not make the water do but they say they cannot.

Motion sustained.

Q. You have said nothing at any time, either to the city or otherwise, or tried to get any other source of supply?

A. I don't know whether you would call it trying or not. I thought a few years ago that it would be a good idea for the city to build their own system. I was willing to do what I could to help get another one.

Q. That was after you brought your bill for injunction?

A. Yes, sir; after I brought it.

Q. While that bill was pending in court?

A. Yes, sir; and since.

Q. You spoke of the water sometimes getting muddy after you have big rains?

A. According to the season. Sometimes you have it every day or two for 30 days and then you don't have them for a long time. Summer time it looks like you never will get another one.

818 W. B. CHEATHAM, sworn by the respondents, testified as follows:

(By Mr. GUERRY:)

Q. How long have you lived in Dawson?

A. I have lived here about 40 years.

Q. Don't live here now?

A. Yes, sir.

Q. Still live here?

A. Yes, sir.

Q. You were mayor several terms—a term or two?

A. Yes.

Q. When?

A. I can't remember the years. Three years in succession. The last year was in '99.

Q. You were mayor in '99?

A. '98 or '99 was my last year; and '97, I think.

Q. You were mayor when this bill was filed?

A. Yes, sir.

Q. You were mayor in '97?

A. '97, 98 and '99 I think are the years that I served last.

Q. Do you remember having a conversation with Mr. James Dawes?

A. During these years?

Q. Yes, the year '97?

A. I don't remember for certain. Think possibly I did.

Q. Well, do you remember at any time during the litigation having a conversation with him?

A. I think I have talked with him more or less ever since the trial of this case—the suit in this case, on each of his visits here.

Q. What did you talk about on those occasions?

A. I can't remember exactly.

Q. Do you remember talking to him about the requirements or contract with the waterworks company?

A. I think possibly one time I mentioned something of that kind. I think it was on the train going from here to Albany. We got in conversation and I told him I didn't think the waterworks company came up to the contract, something to that effect; could not throw from some hydrants a stream——

819 Q. What year was that?

A. I can't remember.

Q. How long was it after the original litigation began?

A. Several years, possibly 2 or 3.

Q. What was ever done by him, until the construction of this tank, to remedy the matter, that you know of?

A. I never made any complaint to him at all. That was not an official conversation during that time, just a personal conversation.

Q. My question was what had he ever done to remedy the trouble prior to the building of this tank, if anything was ever done?

A. Nothing that I know of.

Q. I understand that you mean that this was a conversation——

A. Conversation we had on the train. I told him that I didn't think the waterworks company had come up to their contract. He figured then the force of the water at a certain elevation and by figures proved that it would do it. I then remarked to him that it might figure that way—at least it — practicable but we couldn't get that kind of a pressure, something of that kind.

Q. Have you ever noticed any particular condition of the standpipe with reference to the water at any time during say from '96, '97 and '99?

A. Well, I think twice, I can remember positively no more than that, I found the standpipe empty.

Q. Was that in the day time or night time?

A. One time in the day time and the other at night.

Q. How do you know it was empty?

A. I tried to draw some water in my bath tub; and another time was I thought it was frozen—frozen pipe.

Q. That was the second or third time?

A. Second time.

Q. The first time what sort of weather was that?

A. It was all right. I think the spring time. I won't be sure about that; but it was not frozen water—freezing weather.

820 Q. It was not cold weather?

A. No, sir.

Q. There was no water at all?

A. No water at all. Could not get any flow from it. I thought there was some defect about my pipe and I looked up Mr. Horsley and told him about it and I think upon investigation they found the standpipe empty.

Q. He stated that to you?

A. Yes, sir.
Q. Can you give any idea of what year that was?
A. No.
Q. Was it since '95?
A. I could not tell positively.
Q. Was it since '94?
A. I think it was between '90 and '95.
Q. When was this freeze, do you recollect?
A. Freeze?
Q. When you had the freeze, you say it was not running then?
A. Upon investigation the pipes were not frozen. Not caused from freezing. The standpipe was really empty.
Q. It was empty twice not on account of any freeze?
A. No, sir. Been stopped up several times by freezes. It was twice that I think it was that Mr. Horsley admitted the pipe was empty. The fault of the engineer or somebody, I don't know.
Q. I will call your attention to your affidavit made in May '99, to that part in the affidavit in which there is a date, look at that and see if it refreshes your mind at all as to the date when you found this standpipe empty.
A. Well, that is about the time. I said once during my last administration and once before that I found it empty.
Q. The last time you found it empty, what year was that?
A. It was between '97 and '99.
Q. It was empty between '97 and 99?
A. One year between that. I can't say what year.
Q. Can't say what year prior to that time it was?
A. No, sir; not positively.
Q. How far was your house from the standpipe at that
821 time?
A. I think it was three blocks. I suppose about ¼ of a mile, just about.
Q. The surface where you live is higher or lower than the standpipe?
A. It is lower.
Q. Than w-ere the standpipe is it is lower?
A. Yes, sir.
Q. Where was it there was a failure, upstairs or down stairs?
A. Down stairs. I investigated all around and the water would not run from any faucet in the house.
Q. What was the condition of this standpipe in '95, '96, '97 and '98?
A. You mean the general condition of it?
Q. The condition of the standpipe?
A. I think it was rotten and leaking.
Q. Did you see it?
A. Yes, sir. It was leaking along. I never examined to see whether it was rotten, because it leaked along.
Q. To what extent did it leak?

A. Considerable stream would pour out.

Q. What part would the leak appear to be in principally?

A. Between the whole body of it—between the staves where it come together.

Q. How near was it to the sidewalk?

A. Twenty feet, I reckon.

Q. Any interference with passage there?

A. Yes, sir. Sometimes you would have to go around on the other side of the street to get out of the spray of the water from it. It would wet the sidewalk so until it was almost impassable, especially when ladies would walk around it.

Q. How far was the sidewalk from the standpipe?

A. About 20 or 25 feet.

Q. Did you have any conversation with the superintendent, Mr. Horsley, about the standpipe?

A. I think I have.

Q. What was your conversation about—to what effect and
822 when was it to the best of your recollection?

A. I don't remember exactly when it was; but it was just simply as to the condition of the standpipe—the condition it was in—leaky condition.

Q. What passed between you and him on that subject?

A. I can't remember what he said.

Q. The substance of it?

A. Well, he admitted that the standpipe was in bad condition.

Q. What did he say he had done about it?

A. I think he said he had made complaint to the company about it. Quite sure he said that.

Q. Did that conversation occur before this bill was filed?

A. I think it did—quite sure it did.

Q. About how long?

A. Possibly six months, something of that sort. Several months before.

Q. What were your observations as to whether this standpipe was secure in its foundations during the time you testified about?

A. Well, I never examined it and could not tell anything about it. It was housed in, the timbers were concealed from view and you could not tell anything about it. Casual observer. I never noticed the timbers after they were taken down to see whether they were rotten or not.

Q. Do you ever remember being in the office of the American Pipe Mfg. Co. in the city of Philadelphia?

A. Yes, sir.

Q. State of Pennsylvania?

A. Yes, sir.

Q. In whose presence were you at that time?

A. I think Mr. Keen and Mr. Perot, treasurer and gen'l manager.

Q. What is your recollection as to what was said as to having plenty of money to build these waterworks and own and operate it?

A. I could not remember what was said about it.

Q. The substance of it?

A. How come the conversation to be mentioned, I brought
823 up Mr. Bennett's contract, what Mr. Bennett said about it, and I think it was Mr. Keen or Mr. Perot just in a general way said they had all the money they wanted to put in the waterworks, something of that kind, if Mr. Bennett didn't have it, something of that kind. That they had plenty of money to do it and had plenty of money to do it,—in a position to do it.

Q. What was said about bonds at that time?

A. I don't remember that the question of bonds was mentioned. I can't remember now that it was. Can't remember that far back. How come the money question to be mentioned, was on account of Mr. Bennett's failure to comply with the contract. They remarked that they had plenty of money to carry it out—to carry out the contract, something of that kind.

Q. Do you remember anything about a test that was made on one occasion in '97 on College street of the pressure?

A. Yes, I remember it very well.

Q. Who was present?

A. I can't remember who all were present. Mr. Horsley was.

Q. Mr. J. A. Horsley, the superintendent?

A. Yes, sir.

Q. How come you to be there?

A. It was by accident. I was going out in that part of the town to see a patient, passed by and saw what they were doing and I stopped to see the test.

Q. What did you see?

A. They attached the hose, turned on the stream and threw the water.

Q. How high did they throw it?

A. I suppose 20 or 25 feet, or 30 feet, possibly.

Q. What sort of hose was it?

A. Some new hose they had.

Q. What was the length of it?

A. I think they had 100 feet. I think they tried it both ways, 100 feet and 50 feet. 100 feet quite sure.

824 Q. Was the force of the water turned on?

A. Yes, sir; and the hose well laid.

Q. To make an experiment?

A. Think probably it was.

Q. Who manipulated it?

A. I think Mr. Horsley was present and turned on the stream for them.

Q. Whose hose was it?

A. I think it was the city's hose. Some they took out of the engine house. Not sure about that.

Q. Don't know who the hose belonged to?

A. No, sir. Seemed to be new hose. I suppose the test was made on account of a fire they had a day or two before that.

Q. Which fire do you refer to?

A. The fire in front of the college, Green and Whitehard.

Q. The test was made fairly and fully?

A. I think so from what I could see. I didn't make any suggestions or ask any questions about it.

Q. What was the state of the air?

A. It was——

Q. Would you call it still air?

A. I never noticed any breeze blowing. Seemed to be pretty still. I noticed there was no currents affecting the stream to blow it one way or the other. Seemed to be what you would call still air.

Q. Did that water go vertically 50 feet?

A. I don't think it did. Satisfied it did not. That's how come this conversation with Mr. Horsley and myself.

Q. How far did it go?

A. Twenty to 30 feet. I noticed the height of it. Want above the telephone wires. The telephone wires are about 20 feet high.

Q. The telephone or electric light?

A. The telephone I think. Might have been the electric light.

Q. Did you tell Mr. Dawes about that occasion?

A. Yes, sir. How come this conversation to come up, I told him out on these ends it would not throw the water 50 feet because I had seen it tried.

825 Q. That is on one of the principal streets of the city?

A. Yes, might say it was on one of the principal streets.

Q. Do you know how far the hydrants are apart?

A. Do not. Some will average closer than others—I mean some are closer than others. Average possibly 300 or 400 feet; down in the business part of the town possibly not so far, 200 feet.

Q. How about the other part of the town?

A. Farther apart, possibly 400 or 500 feet.

Cross-examination.

(By Mr. WIMBERLY:)

Q. I believe you said that—you fixed the first time that the water got out of the standpipe, was somewhere between '90 and '95?

A. It was I think within the first 2 or 3 years of the installation of the waterworks.

Q. Prior to the litigation?

A. Yes, sir.

Q. How long did it stay out of the standpipe?

A. I think Mr. Horsley atten-ed to it promptly.

Q. As soon as you reported it?

A. I think possibly he found it out about the time I did.

Q. You discovered it early in the morning?

A. Yes, sir.

Q. And promptly reported it to him?
A. Yes, sir.
Q. And he at once attended to it?
A. Yes, sir.
Q. From that time on, during the following years, up to the time of the litigation, it never happened any more?
A. Don't remember ever knowing it to be empty afterwards—but those times I have mentioned.
Q. You have had water in your house from that time up to the present?
A. Have used it, yes.
Q. Those are the two occasions that you knew of it being empty—the standpipe?
A. The only times I can remember.
Q. The other time you attributed it to freezing?
A. Yes, sir; I noticed the thermometer and noticed it was
826 freezing; and tried to find Mr. Horsley and think possibly he was in the country.
Q. How long did it continue at that time?
A. I don't know, sir, possibly the middle of the forenoon, something of that sort—2 or 3 hours. As soon as I satisfied myself the pipes were not frozen, I went away from home and tried to find Mr. Horsley but could not.
Q. Just a short time before it was put back in the standpipe?
A. It was all right when I went back at noon.
Q. Except those two occasions of a few hours each that the water was out of the standpipe, during the time that elapsed from '91, to the present, you never knew of it to be out of the standpipe, the water?
A. No, sir.
Q. You spoke of a test out here, did you as mayor have anything to do with that test?
A. Did not.
Q. Did the city have anything to do with it?
A. Not that I—not that I ever heard of. Possibly there were some members of the fire company there.
Q. Were they there by direction of the city or city council?
A. No, sir; if they did I didn't know of any such action.
Q. They were trying the hose—At that time did the city ever take it up and endeavor to have a test made of the different hydrants?
A. Not during my administration.
Q. You were mayor during that year?
A. Yes, sir.
Q. And the next year, '98?
A. Yes, sir.
Q. And the next year, '99?
A. Yes, up until December '99.

Q. During that time the city did care or see fit to have the system tested?

A. I don't think they did, no, sir. I don't remember that any such action was taken.

Q. You spoke of a conversation with Mr. Dawes, did he explain to you why they had not repaired it sooner?

A. Which?

827 Q. Why they hadn't put the standpipe back any sooner: I believe that is the conversation you speak of?

A. He figured it on scientific principles and told me why it was bound to throw the stream 50 feet.

Q. You didn't request any regular test?

A. That was the only conversation we had. A short conversation between here and Albany. He was going to Albany and I was going there too.

Q. Did you as an official, or otherwise, request to have a regular test made of the system?

A. I did not.

Q. You cannot fix the date of that conversation?

A. I cannot.

Q. Let me refresh your recollection and see if you can fix it: Wasn't it after the second trial of the Dawson Waterworks Co. case against the city, in July '98, on his return home?

A. No, sir; it wasn't in '98. Don't think it was. If I could remember the dates of Mr. Dawes visits to Dawson—I don't know whether he stopped at Dawson at that time. If he did it was only for a short while. I don't remember seeing him until I got to the depot.

Q. You remember right after the battle of Santiago, along about the 5th of July we had a hearing here before Judge Sheffield, the second trial of the waterworks case and Mr. Dawes returned home by way of Albany?

A. The first trial of this case I was not a witness in it. It was tried without my knowing anything about it.

Q. I am speaking about the trial in July '98.

A. I was not present at that trial.

Q. You were in town?

A. I was at home.

Q. That's about the time that conversation occurred?

A. Possibly it might have been that time. Won't be sure of the date.

828 Q. At that time did Mr. Dawes tell you that they would have made these repairs sooner but for the litigation, anything of that sort?

A. I forget whether it was him or Mr. Horsley that made the remark once, when I mentioned something of the kind to them, if this litigation was ever stopped they would make the system more perfect, something of that kind. I forget whether it was Mr. Dawes or Mr. Horsley.

Q. The litigation was going on when you told Mr. Dawes that?

A. That's what I say. I don't recollect whether that conversation was with him or Mr. Horsley.

Q. It was after the litigation had begun at any rate, at the time of that conversation?

A. I can't remember that, Colonel. I will say this: It must have been after that litigation, because I had no opportunity of finding out whether this pressure would not have the proper—would not carry the stream the proper height or not if there had not been some test in some way made. I think it was after the litigation begun that I had that conversation with Mr. Dawes.

Q. You spoke of the time that you went on to see the American Pipe Mfg. Co.; and you spoke about Bennett not having the funds with which to do the work and they told you they could raise the money, or something of that sort, I believe you said?

A. I think that is about what it amounted to, that they were in a position to furnish the money that was necessary to build the works.

Q. They didn't tell you whose money it was or how they would raise it?

A. No, never said anything about that.

Q. They did before they acquired this franchise ask for an extension of time in order to get an opportunity to float the bonds, you remember that?

A. I don't remember whether it was for an opportunity to float the bonds. I remember that an extension of time was granted.

Mr. GUERRY: That is in the book.

829 The MASTER: Is it in the record?

Mr. GUERRY: Yes, sir.

Q. You didn't know the money was to come from the sale of the bonds, you didn't know that?

A. Did not.

The MASTER: How is that material, whether he knows it or not?

Mr. WIMBERLY: There are some allegations in the bill about their having the money.

The MASTER: Was he mayor at the time?

Mr. WIMBERLY: He was mayor when they passed the resolution giving them 60 days' time.

Mr. GUERRY: We admit the resolution.

WITNESS: Yes, it was granted then, I think.

Q. After refreshing your recollection they did expect to market the bonds, didn't they?

A. It seems so from that.

Q. Do you remember a man named J. K. Cumming who came down here and met you as mayor and explained to you that his company was called upon to act as trustee for the bondholders and made

inquiries about the contract to build the water works, you remember that?

A. I remember meeting Mr. Cumming, think he was president of some bank.

Q. Some trust company?

A. Some officer of some bank, 7th national bank, something of that sort.

Q. Don't you remember his being president of the trust company and told you that his company was called upon to act as trustee for the bondholders?

A. No, sir; I don't remember that.

Q. He told you that his visit was connected with the bonds, didn't he?

A. I don't know whether he did or not. I remember his coming here. I think I carried him up and introduced him to Mr. Carver. Think he was president or connected with some national
830 bank; and I took him up to the National Bank of Dawson and introduced him as an officer of a bank in Philadelphia. The bond part I don't remember about that. It is possible that he may have been but I can't remember about that.

Q. Don't you remember that while Mr. Cuming was around at your place of business that he had you send for the minutes of the city council of Dawson and they were brought around to your place of business and examined by Mr. Cuming there?

The MASTER: What issue does this testimony illustrate in this case? I don't think that is material.

Q. You said something about the standpipe that was in a leaky condition: It got in that condition, I believe you say, about 6 months or a year before the present one was built?

A. How long before when?

Q. Before the present tower was built—how long before '99?

A. I don't know. It was leaking for some considerable while through neglect; but it wasn't leaking badly until possibly 6 or 8 months before it was torn down.

Q. Six or eight months before it was torn down it got to leaking badly?

A. Yes, sir.

Q. Up to that time the standpipe was all right?

A. It was. It would leak occasionally, I suppose, because more by being sun dried and then it was very decayed.

Q. You spoke of streams running from it during the time it was in a bad leaky condition?

A. The streams were quite small. Came between the staves.

Q. They were up towards the top?

A. Yes, sir; towards the top and the bottom.

Q. Started at the top and trickled down to the bottom?

A. Yes, sir.

Q. You were mayor in '90, I believe, when the contract
831 was made with Bennett?

A. Yes, sir.

Q. And in '91, when the waterworks was erected under that contract?

A Yes, sir.

Q. Who selected the source of supply?

A. I can't say. There were three or four different places submitted; and I think it was left to the waterworks company to take either one of those.

Q. You had, as mayor of the city, had Professor H. C. White, didn't you, furnish you an analysis of the water that is in the record?

A. Yes, sir.

Q. You were thoroughly satisfied with his competency as a first class chemist?

A. Yes, sir; satisfied with his analysis.

Q. You know his reputation as a chemist?

A. Yes, sir.

Q. Throughout the State?

A. He is regarded as a man thoroughly capacitated.

Mr. GUERRY: We are making no attack on Prof. White.

The MASTER: Yes, I think the fact that they furnished an analysis is sufficient proof.

Q. Were any requests made or any complaints made, while you were mayor, that you had any knowledge of, for any further analysis by any one else?

A. None at all.

Q. Everybody was satisfied with the analysis, were they not?

A. Seemed to be, yes.

Q. You are a physician, are you not?

A. I have practiced medicine, yes.

Q. You have been a practicing physician for 20 years or more?

A. Yes, sir.

Q. Physician in active practice?

A. I was in active practice for several years, yes, sir.

Q. You yourself after your own investigations was perfectly satisfied with the water supply?

A. Satisfied at the time, yes, thoroughly so.

832 Q. Have you ever sought to have any further analysis made?

A. I have not.

Q. From that time to the present?

A. No, sir; none at all.

Q. Did you make any request of that sort as mayor in '97 '98 or '99?

A. Did not.

Q. Or while you were mayor?

A. Did not.

Q. You made an affidavit here of record, July 30, '94?

A. Yes, sir.

Q. It is a fact, before entering into the contract with Bennett, the city council, in order to carry out the wishes of the people as expressed in an election in '86, did canvass the matter thoroughly and try to get the best arrangements in the way of waterworks they could for the city?

A. We thought it was pretty thoroughly the sentiment of the people. We were satisfied that we carried out what we thought was the wish of a majority of the people.

Q. You looked into the situation—this was not the only effort that you made, was it, you made other inquiries and investigations, didn't you?

A. We made several investigations as to the experience of certain water supplies, yes.

Q. And cost?

A. Cost, etc.

Q. Correspond with different people?

A. I don't know that at other times it was possibly quite so extensive.

Q. During other times?

A. At other times in a general way only.

Q. You discussed the matter freely with the citizens of the town in doing what you did?

A. We did so, yes.

Q. Endeavor to learn the wishes of the citizens and acted for them in the matter?

A. We represented them of course. We were very careful, we thought, in investigating the matter.

833 Q. Nearly every citizen was in favor of the contract that you made, were they not?

A. Well, we had no objections at all raised. None at all.

Q. You talked with the different ones and you heard of no objections at all?

A. I think Mr. Lowrey, possibly, expressed some disaffection or dissatisfaction. Mr. Lowrey said he didn't think the town was able to put up a waterworks. Didn't go into it. He and Mr. Frank Bethune, and Mr. Hires all voted against it.

Q. Those are the only three people that opposed it?

A. The only white people that I can recall now.

Q. The contract was duly published, you had that done?

A. Yes, sir; it was published for 4 or 5 weeks in the Dawson paper here.

Q. Nobody objected?

A. Only, as I said, Mr. Lowrey was very free in discussion that the city was not able to own a system of waterworks.

Q. That's the only objection that anybody made?

A. Yes, sir; all that I remember. Made no impression on me that I remember of.

Q. Going back to that conversation that you had with Mr. Dawes, didn't Mr. Dawes tell you in that conversation that you speak of having with him on the train, that it was the intention of his people to put in an artesian source of supply and make the system thoroughly satisfactory to everybody and it was only the holding up of their rentals or this litigation that prevented them from doing it?

A. I don't remember Mr. Dawes saying that. I remember Mr. Horsley saying once or twice if this law suit was stopped or settled, they would put in a source of supply of that kind.

Q. That is substantially what Mr. Dawes said to you, make it thoroughly satisfactory with the city if it was not for the lawsuit?

A. I can't remember his stating it that way, no, sir.

834 Q. What did he say on that line?

A. I can't remember anything but that I remarked to him about the force of the water, the height the stream could be thrown. That's about all. I don't think we mentioned the quality of the water at all. I can't remember that that question was brought up. Might have mentioned it but I can't remember it. I was thinking at the time about the height the stream was thrown. It was pretty soon after that test was made and that made an impression upon my mind. I thought more of that than anything else.

Q. The test that you speak of when you passed by, did you measure it in any way or did you guess at it?

A. Guess work.

Q. There was never a thorough systematic test—official test made?

A. Nothing in the way of an official test that I know of, no, sir.

Q. Didn't even go back on that occasion and test any other hydrants to see whether there was any obstruction between that hydrant and the next one beyond?

A. That's the only test I know of.

Q. This was a last hydrant on a dead end?

A. I think it was the last hydrant.

Q. Didn't even take the pains to go back to see whether the difficulty lay between this hydrant and the next one further back on the main?

A. I don't know. I left them at the hydrant. I don't know whether they disconnected the hose——

Q. Didn't even wait to see any other test?

A. I saw the height the stream was thrown, possibly spoke to one or two of them about it and then went on.

Q. The old tank stood in a little bit different position from the present one?

A. Yes, sir.

Q. Nearer the sidewalk?

A. Yes, sir.

Q. It was really in about 5 feet of the street?

A. I think it was further than that inward. From 10 to 25. I could not say for certain.

835 Re-direct-examination.

(By Mr. GUERRY:)

Q. How were these streams selected, tell the court who selected them?

A. I think possibly there was a committee from the city council that went and took the water from 3 or 4 places.

Q. Do you know what places they took from?

A. Yes, sir; I can remember three of them. If there was more than three I can't remember them.

Q. You there?

A. Yes, sir; I took the water myself.

Q. State where you took it from?

A. Took one from a spring known as the Dunn spring.

Q. Where is that?

A. That is about three or four hundred yards above the water station.

Q. On the west side of the branch?

A. On the west side of the branch, yes. Another was from the stream, creek just above the bridge almost opposite the water station. The third was from over in the field—a little spring in the field to the left of the road, west of the pumping station, about 300 or 400 or 500 yards.

Q. Was it in the same bottom?

A. No, different stream.

Q. Different bottom?

A. Yes, sir. Those were the three places.

Q. Wasn't there four?

A. I can't remember four. There were three that I remember. If there were four taken I can't remember the fourth one.

Q. Where did you take these samples from?

A. Took one from the spring, one from this place opposite the pumping station, and one 300 or 400 yards west of the pumping station, spring branch.

Q. What was the condition of the water at the time you took them?

836 A. I forget the time it was taken. The water was perfectly clear and all right. Seemed to be no sediment in it. Don't think we made any special effort to get clear water, anything of that sort.

Q. The water was clear at that time?

A. Yes, sir.

Q. Who was that you talked to about changing or increasing the source of supply—who was it that you talked to?

A. I think it was Mr. Horsley. I won't be sure about that.

Q. When was that?

A. Talked in a casual way, not an official way.

Q. When was that?

A. It has been mentioned, possibly, several times within the past 4 or 5 years.

Q. Between you and Mr. Horsley?

A. Yes, sir.

Q. What did he say on those occasions?

A. He simply remarked if this litigation was stopped or if the case was settled, the waterworks company would put in artesian wells, something of that sort.

Q. Why would they do that?

A. Improve the quality of the water. I was talking to him about the quality of the water, didn't think it was fit for drinking, especially during the dry summer time.

Q. Did he deny that?

A. Don't think he did. Think he admitted the water was not what it ought to be for drinking water.

Q. That is the case on each occasion when you talked about it?

A. Think so.

Q. Said if the litigation was stopped that they would dig artesian wells or do something else to improve the supply?

A. Improve the quality of the water and the quantity as well. I remember further he remarked this branch was liable to go dry sometimes—might dry up on him and the city would be placed in a hazardous condition for want of water.

837 Q. He said it got very dry at times anyhow and was insufficient?

A. Yes sir; that was a notorious fact.

Q. Not asking you that: Did he say that?

A. Yes, sir; said the branch was liable to dry up on him and liked to have dried up 2 or 3 times.

Q. You said it was a very notorious fact, have you been up there and seen the supply was very inadequate?

A. Yes, sir. Here once or twice they had to pump at night—had to pump day and night, to catch every particle of water to keep the pumps going and keep the standpipe anyways filled—in condition for use.

Q. Did they keep it sufficiently filled even with their exertions during that time?

A. They kept sufficient water except for sprinkling purposes. At several times the water sprinkling stopped and refused to allow the city to use the water for sprinkling purposes. The sprinkling man had a contract for sprinkling the streets.

Q. Have they ever utilized all these springs that you spoke of?

A. All these places?

Q. Yes?

A. No, sir; only utilized one place that I know of.

Objected to as immaterial.

Q. Which one was that you say they never utilized?
A. One three or four hundred yards west of the pumping station in a different bottom.
Q. What is the size of that spring, considerable or not?
A. No, sir; smaller than either of the others.
Q. Supply any water at all?
A. The supply dries up in the summer possibly.
Q. What spring are you talking about now?
A. Talking about the spring in the field about 300 or 400 yards west of the pumping station.
Q. Does it supply any water at all as a rule?
A. Oh yes; considerable stream there for several months in the year.
838 Q. Now Doctor, in relation to this contract with Bennett & Co., at the time of this election, this contract with Bennett & Co. never had been heard of, had it?
A. No, sir.

The MASTER: What is this in rebuttal of? I think you brought all that out and he has been cross-examined on it.

Recross-examination.

(By Mr. WIMBERLY:)

Q. It was only on one occasion that they ordered the sprinkling stopped?
A. I think it was more than one.
Q. You know of more than one?
A. I can't recall it to mind; but I think there was more than one.
Q. You would not be positive that it was more than once?
A. Yes, sir; quite positive that it was on more than one occasion.
Q. How many times would you be positive about?
A. Possibly twice or three times.
Q. That was a day or so at a time?
A. Few days might say.
Q. During an unusually dry spell?
A. Yes, sir; quite a dry spell.
Q. This was the largest of the different sources of supply as a rule?
A. This was the largest source of supply that I can remember now.

(By the MASTER:)

Q. You say you took a sample of the water that was analyzed?
A. Yes, sir.
Q. I understand you to say you took one from the branch?
A. Yes, sir.
Q. At a given point near the present pumping station?
A. Yes, sir.

Q. That sample represents the quality of the water that they use as a source of supply?

A. Yes, sir.

839 Q. Now you spoke of a small spring 300 or 400 yards distant, did I understand you to say that spring did not flow into——

A. Don't run into the other at all, except possibly half a mile below.

Q. Ran in below?

A. Yes, sir.

Q. Could it have been conveniently conveyed to the other stream?

A. Could not have conveniently have used that, no, sir. The source of supply they took really took in what we speak of as the Dunn spring, that is, the place where they did take it in. Utilized both of those places.

R. L. MELTON, sworn by the respondents, testified as follows:

(By Mr. GUERRY:)

Q. How long have you lived in Dawson?

A. Been here about 28 years.

Q. What office did you hold during the last years?

A. Last few years I was alderman. Alderman in '98 and '99; and I reckon I was alderman in '84, '85 and '86.

Q. '84 and '85, or '94 and '95?

A. '94 and '95 and I reckon '84, '85 and '86.

Q. In '94 and '95, as alderman, what chairmanship did you have with reference to the fire department, if any?

A. I was *foreman* of the fire committee.

Q. Did that committee have special jurisdiction over the fire department?

A. Yes, sir.

Q. Do you remember the action of council in '94 in renunciation of the waterworks contract?

A. Yes, sir.

Q. After that what did you do in consequence of that action in reference to the fire department?

A. As soon as we did that I had these two cisterns out here pumped full of water and I had Mr. Roberts to overhaul the engine.

Q. What year was that?

840 A. I reckon that was about the 1st of '95, my recollection.

Q. You had what done to the engine?

A. Had some little repairs done on it.

Q. What else did you have done, anything with reference to the apparatus?

A. Had the cisterns filled.

Q. How many cisterns were there then?

A. There were six.

Q. Well, what directions did you give the fire department if any, or notice or instructions?

A. The fire company had a row about that time and they went to pieces. I think they throwed up. Some got disgruntled. Mr. Bishop I think managed the one at the Variety works. I notified him we had nothing more to do with the city waterworks and must not have anything more to do with the hose.

Q. Have nothing more to do with what?

A. The city water works, attach their hose to them. Mr. Jim Roberts took charge of the engine over there and looked after the hose. Also notified him.

Q. You say you did what?

A. Notified Mr. Roberts.

Q. What did you tell him?

A. I told him we had no contract with the waterworks company; that he could not use their water any more nor the city council.

Q. Did you give any of the rest of them any notice?

A. Not that I recollect of.

Q. Do you remember whether you gave the colored man, Bill Patterson, any notice or not?

A. Bill come to me—they had this chemical engine, the only thing, and he come to me and wanted to get exemption from street tax beginning with that year I think. He had nothing to do only with the chemical engine.

Q. During these last few years, during the renunciation of this contract, have you had any experience with the water of this company as a citizen either at home or at your store?

841 A. I have been using it at my house.

Q. What sort of water has it been during these years?

A. At times it is very poor.

Q. Under what circumstances?

A. Principally in the winter months and spring. Sometimes it is perfectly muddy. Muddy as a mud hole in the street.

Q. Did you notice any odor about it at any time?

A. No, I don't know that I noticed any odor. Filthy, unsatisfactory looking water.

Q. Is it that way a good deal of the time or occasionally?

A. Only when we have wet weather. It clears up during dry weather.

Cross-examination.

(By Mr. WIMBERLY:)

Q. You were present at the time this case was tried in this county, the case of the City of Dawson—The Dawson Waterworks *vs.* The City of Dawson, tried in November '96 and again in July '98, were you not?

A. I think I was here one time to the best of my recollection.

Q. You testified in November '96, didn't you?

A. I could not recollect what year it was. I don't think I ever testified in it but once to the best of my recollection.

Q. In your testimony before [you said nothing about the quality of the water, did you, as to its being muddy, anything of that sort?

A. I don't recollect.

Q. Isn't it a fact that when you were again questioned on that trial in Nov. '96, when it was much fresher in your recollection than it is now, you could not remember a single person that you ever told not to use that water?

A. I could not say as to that.

Q. It was a good deal fresher in your recollection then than it is now?

A. I suppose anything would go out of anybody's remembrance about the same proportion.

842 Q. Isn't it a fact that you didn't testify before that you told R. A. Bishop and Jim Roberts; but you stated you could not name anybody that you told?

A. That may be true. I recollected afterwards about Mr. Roberts. I went to see him about having some work done on the engine and I told him about the action.

Q. What did Mr. Jim Roberts have to do with the fire company?

A. He had charge at that time of the engine and looked to him to dry out the hose.

Q. Did you ever see Mr. Jim Roberts at any fire in charge of the engine during '95, '96, '97, '98 and '99?

A. Not that I know of.

Q. Isn't it a fact that Mr. Deubler had charge of the engine and Mr. Jim Roberts had nothing to do with it?

A. That's one reason I had it done. Mr. Deubler refused to have anything more to do with the engine.

Q. Is it a fact that at a single fire during the years from '95 to '99 that Mr. Roberts did carry that engine out?

A. Mr. Roberts didn't have anything to do with carrying the engine out.

Q. What repairs did you have done on that engine?

A. Some of the valves may be and a glass gauge.

Q. Do you remember whether that was in '94, '95 or when?

A. That was about the last of '94, I think.

Q. Do you know what it cost?

A. No, sir; a small amount.

Q. A dollar or two?

A. I think so.

Q. Except that dollar or two spent on the engine, you don't remember to have had any other repairs done on the engine?

A. I believe some little items after that. Nothing to amount to very much.

Q. Never amounted to a dollar or two at any other time?

A. I don't recollect the exact amounts.

843 Q. Can you specify any cistern that you ever put any water in after January 1st, 1895?

A. Yes, sir.

Q. Where?

A. In the one right out there at the corner of Lee and Main streets.

Q. When did you have any water put in that?

A. Right away after we didn't have any contract with the waterworks.

Q. Where did you get that water?

A. Out of the pump there.

Q. Which pump?

A. Pumped it in.

Q. Is that the only cistern you put water in?

A. That one fills the other one.

Q. Which other one?

A. The one down in front.

Q. Two close together?

A. No, sir; this other one over here.

Q. You filled that one?

A. Yes, sir; pipe runs from one to the other.

Q. That filled at the same time?

A. Yes, sir.

Q. What other cisterns did you fill after January 1, '95?

A. The other had supplies.

Q. Took their supplies from the Dawson Waterworks Co.?

A. No, sir.

Q. Did not?

A. Not that I know of.

Q. You are the chairman of the department and don't know where they get their supply of water?

A. If they put any in there I didn't know it.

Q. Do you know of their getting any water from any other source?

A. I told you I filled them myself.

Q. In these two; but the other four. Don't you know the Robinson house was burned down prior to that time and that was the only supply to that cistern?

A. No, sir; a pipe was put across to that brick building across over there.

Q. When was that done?

A. About the time they built the cistern.

Q. At the time they built the cistern?

A. Yes, sir.

844 Q. Isn't it a fact that in January '95 there was no supply of water for that cistern except the Dawson Waterworks Co.?
A. The Dawson Waterworks Co. didn't put any in there.
Q. Any other source of supply?
A. Yes, sir; I told you it had a supply—had a natural supply.
Q. What was that natural supply?
A. The water after the house there.
Q. Which house?
A. Off this brick building block.
Q. Isn't it a fact that you testified in Nov. '96 that you were not able to say that there was a single one of the cisterns except one that held any water, in '95 or '96?
A. No, sir; I didn't say they didn't hold it.
Q. What condition were those cisterns in in '95 and '96?
A. I suppose in very good condition.
Q. Don't you know that a majority of them didn't hold water?
A. No, sir.
Q. And those that held water got it from the waterworks company. Did you ever see the one in front of Captain Fulton's in '95, on Main street?
A. Ever see it?
Q. Did you during the year '95 or '96 ever see or examine the cistern in front of Captain Fulton's?
A. I could not say exactly. I suppose if I didn't go there myself I put the cistern in fix, I suppose, or had water in them.
Q. Don't you know they didn't have water in them?
A. No.
Q. Don't you know it didn't have any water in it?
A. No.
Q. Do you know it had any?
A. Do I know it did?
Q. Yes.
A. I could not say positively it did have.
Q. The one in front of the Variety works did that have any water in it in '95?
A. Yes, I think that had water in it all the time.
Q. '96 all along?
A. Yes, sir.
Q. You know that did or think so?
845 A. Well, I have been there. I could not recollect; but lately know there is water in it.
Q. The one on Main street—Lee street, near where Mr. Carver had the windmill, that have any water in it?
A. I think the wind-mill supply had been cut off at that time, to the best of my recollection.
Q. Had no supply at that time?
A. Could not say positively.
Q. How many fires, beginning from January 1st, 1895, up to May 1st, 1899, did you ever see the fire engine out?

A. I don't recollect.

Q. Did you ever see it at more than 2 or 3 during those five years?

A. I could not tell how many times.

Q. Can you specify any fire from January 1, 1895 to May 1, 1899, that you ever saw the fire engine used at?

A. I know they carried it out several times.

Q. Do you remember any fire they have carried it out?

A. Yes, I think they had it out at the fire at the hotel.

Q. In '98. Do you know of any other fire they had the engine at?

A. I don't recollect. I have seen them carry it out several times.

Q. Don't recollect any other fire?

A. No, sir.

Q. Could you say that it had been carried out as much as twice?

A. From what dates?

Q. From January 1, 1895 to May 1, 1899?

A. Yes, I think I have seen it out as many as 4 or 5 times in that time.

Q. In '98 when you saw it where did it get its water at the time of the Farnum House fire?

A. I don't know.

Q. Don't you know it got it from one of the fire plugs of the Dawson Waterworks Co.?

A. Didn't go to it.

Q. Could it have gotten it from any other source besides the Dawson Waterworks Co. after January 1, 1895?

846 A. I don't recollect to have known.

Q. Did you ever see that fire engine get any water out of a cistern after January 1st, 1895?

A. Don't know as I have.

Q. At every fire where you saw that fire engine used, there was also a lot of hose lines used—connected with the fire plugs?

A. I have been to but very few of the fires.

Q. Tell me in your own words what was your official title when you were in council?

A. When I was in council?

Q. In connection with the fire department?

A. Didn't have anything to do with it, only on the fire committee. If they wanted any repairs, they come to me—the fire company.

Q. Who would come to you?

A. Those that had charge of the fire company.

Q. Come to you for repairs, new hose and things of that sort?

A. Anything they needed.

Q. And you furnished it?

A. Any little items. Anything that amounted to anything would be referred to council.

Q. You testified in '96 that you were chairman of the fire department instead of the fire committee?

A. I was appointed by the city council as chairman of the fire committee.

Q. You were at several fires in '95, '96, '97, '98 and '99, were you not?

A. I went down to that lumber kiln fire and I was at this fire at the hotel.

Q. Were you at the bakery fire?

A. No, sir.

Q. At every fire you were at you saw them using the plugs of the Dawson Waterworks Co.?

A. Used them at the hotel and down at the lumber kiln.

Q. All you were at?

A. Yes, sir; but I don't think I have been to but two or three.

Q. You never knew of their using water from any other source?

A. No, sir.

847 JOHN SEAY, sworn by respondents, testified as follows:

(By Mr. GUERRY:)

Q. How long have you been a resident of Dawson?

A. About 12 years.

Q. What position did you hold in '98?

A. From '94 to '98, I think along there, I was chief of police. I think that's about the time.

Q. Of this city?

A. Yes, sir.

Q. Do you remember anything about the condition or organization of the fire department in the city during those years?

A. Yes, sir.

Q. What did it amount to?

A. Very poor, I thought. I was a member of the fire company. We all got over here and organized, I don't remember the year exactly. In the first place, we never had any system about it. Never any good members to attend regular or do anything at fires.

Q. From '94, up to the date of the paid fire department, do you remember when that was organized?

A. Yes, sir.

Q. When was that?

A. I say I remember——

Q. About '99?

A. Yes, sir; I think along about that time.

Q. Up to that time, during these years, who did the work of putting out the fires when you had one?

A. Most everybody in general that got there first.

Q. Was it the work of any particular organization or the crowd that assembled?

A. Generally the crowd that assembled.

Q. You were generally present on such occasions?

A. Yes, sir; always tried to get there. I remember one time taking the reel over here to Dr. Dean's, don't think there was a man that belonged to the fire company—yes, Robert Baldwin was present and helped to pull it over there.

Q. How many in that squad?

A. 16.

Q. Were you the only two firemen in it?

848 A. Yes, sir; Robert Baldwin and myself and two negroes helped us.

Q. They were not members?

A. No, sir.

Q. Do you remember the McClellan fire in June '98?

A. I remember the fire very well but not the date.

Q. Was it about that time?

A. Yes, sir.

Q. Been any McClellan fire within your recollection except that one?

A. That's the only one I know of, sir.

Q. Did you notice the use of the hose on that occasion?

A. Yes, sir.

Q. What was the length of it?

A. I can't exactly give you the length of the hose. Can give you the distance from the plug to the fire. Don't think there was but three sections of hose. Don't know what the length of the hose is, some 30 and some 50 feet to a section. It is even 100 feet from the plug to the eaves of the house.

Q. Have you measured that?

A. Yes, sir; I have.

Q. You say you recollect there were three sections of hose?

A. I don't think there was but three sections.

Q. You don't remember the length of the section?

A. No.

Q. Do you remember whether there was any surplus hose used on that occasion to reach from the plug to the fire?

A. No, sir; I do not. I didn't have hold of the hose myself.

Q. What would you say to the best of your judgment as to the length of the hose used on that occasion?

A. I have stated that there was three sections of hose only. I think it was cut right square across the fence towards the fire—it is right straight across the street.

Q. Was it 90 feet or more in your judgment and recollection?

Mr. WIMBERLY: What 90 feet?

Mr. GUERRY: The hose.

Objected to as leading and objection sustained.

849 Q. State according to the best of your recollection and judgment the length of the hose?

A. I don't think the hose was over 100 feet.

Q. Was the water fully turned on that was used on that occasion?

A. It was, sir.
Q. How many lines of hose were used on that occasion?
A. I think there was three.
Q. From which plug?
A. There was only one line from that plug.
Q. *Three from that main?*
A. Three wasn't from that main.
Q. How many different lines of hose——
A. Well, sir; there was one line of hose run from in front of my house on a different street; and there was one line of hose attached in front of the house on this street right out there, Lee street, and then there was one above on the same street, right above Col. Evans' house—two on the same main.
Q. How far apart were they?
A. Anywhere from 250 to 400 feet.

The MASTER: Ask him as to the size of the nozzle?

Q. What was the size of that nozzle?
A. I can't tell you.
Q. Was it the size that was used?
A. Yes, sir; one they used all the time.
Q. By the city?
A. Yes, sir: and in its paid department by the city. I know the size of the hose but am not familiar with the size of the nozzle at all. I don't know the measurement of it at all.
Q. It was the usual nozzle?
A. Yes, sir.

The MASTER: I can't admit that testimony.
Mr. GUERRY: I will supply that, sir.
The MASTER: I hardly think you have shown that the conditions were substantially similar. He says there were three sections of hose and he does not know whether they were 30
850 or 50 feet or 90 feet, according to his testimony. It does not appear that it was still air
Q. What was the condition of the air. Was there any storm brewing or going on at that time?

Objected as leading and objection sustained.

Q. State what was the condition of the weather?
A. I think it was a pretty day. Don't think there was any storm concealed, anything like that. There was no storm.
Q. Still?
A. Yes, sir; to the best of my recollection.
Q. Did you see the water thrown from this hose and nozzle?
A. It was dark. I was present but we could not get any water on the house.
Q. How high was the house?
A. About 20 feet, I think to the eaves. Single story building, McClellan's was.

Q. Was there an effort made?

A. They got there with the hose but could not get the water on it. They would take the hose and throw it this way. (Illustrating.)

Q. You will have to use words?

A. We tried to get water on the house but could not throw it up to about only the eaves of the house; and we took the hose and threw it up and down, trying to make the water go further.

Q. How high did it go?

A. Hit on top of the house about 20 or 25 feet high. Didn't go on the roof of the house, hit on the eaves of the house.

Q. You say it did go on the eaves?

A. Did not.

Q. How high was the roof?

A. Single story house about 20 feet from the ground up to the eave of the house.

Q. And further up to the comb how high was it?

A. I could not say.

Q. The best of your judgment?

A. I should think it was anywhere from 40 to 50 feet—40 feet I will say.

Q. From where, from the ground to the top?

A. Yes, sir.

851 Q. Up to the comb?

A. If you go straight up. If you take it with the eaves of the house it would be higher from the ground.

Q. How high would you say it was?

A. I would say by going up to the eaves of the house might be about 50 feet.

Q. How high did the water go?

A. About 20 or 25 feet. Not over 25 feet.

Q. Any effort made to get it higher than that?

A. Yes, sir.

Q. During the efforts made to get the water on, how was the water thrown, was it thrown straight up?

A. No, sir; thrown slanting.

Q. Any time was it thrown straight up?

A. Not that I remember.

Q. How many different positions was it thrown in save holding it in one direction?

A. Of course they moved the hose about trying to play on the fire. It would break out in new places and they would move the hose about.

Q. How long was that going on?

A. Burned the house down. It was destroyed by fire.

Q. How long was this effort made to use the water through the hose?

A. I don't know how long the fire lasted. Of course we played on the fire there—around the edges of it.

Q. About how long?

A. The fire burned—I could not tell you how long the house was burning down.

Q. Ten minutes?

A. Longer than that.

Q. An hour?

A. Hardly that long. 25 or 40 minutes, something like that.

(By the MASTER:)

Q. Were you a member of the fire department?

A. Not at that time I was not. I was chief of police.

Q. Did you attach the hose to the water main?

A. Did not.

Q. Did you see it done?

852 A. I saw it after it was done. I may have seen it done but I could not say positively. I think I helped pull the reel up there.

Q. Do you know whether the water was turned on full force or not?

A. Yes, sir; that was tried. I think Mr. McNulty went back to see if he could get any more water.

Q. Did you go back?

A. No, sir.

Q. You don't know of your own knowledge?

A. No, sir; I was not present. I didn't go back myself.

Q. All you know is what others told you?

A. I say I saw them going back.

Q. What I want to know is this: Do you know of your own knowledge whether that water was turned on full force or not?

A. As I say, I didn't do it myself; but I saw them turning it.

Q. Do you know the condition of the hose?

A. Whether it was good hose or not?

Q. Yes?

A. Think it was. Just a very short line of hose we had. Just a short distance to the other place where the hose was attached. No ways off and didn't need many hose at that place.

The MASTER: I don't think I can let this evidence stay in.

Mr. GUERRY: I propose to complete it.

The MASTER: At this stage of the case I cannot admit it. However, I will reserve my ruling on it until you finish.

(By Mr. GUERRY:)

Q. The plug that you were using, was that nearer or further from the pumping station—from the standpipe, I mean, than the other plug in the main?

A. That the hose was attached to it is nearer.

Q. The one the hose was attached to is nearer the standpipe?

A. Yes, sir.

Q. Did you measure the distance from the plug to the fire in the case of Green and Whitehard?

A. Yes, sir.

853 Q. What was that distance?

A. Well, from the plug—from the nearest plug was 250 feet.

Q. The one you used?

A. Used more than one in that fire.

Q. The nearest one you used?

A. 250 feet—wait a minute; I think that's right, 250 feet.

Q. What experience have you had with the water of this water-works company as to its quality and condition for domestic purposes?

A. At times it is very muddy.

Q. Well——

A. I use it at my house.

Q. What portion of the time is it that way?

A. Especially if we have any rain for any time it gets very muddy.

Q. What condition does it get with reference to its fitness for use?

A. Gets to where you can't use it at times.

Q. For what purpose?

A. Domestic use.

Q. What do you mean by that?

A. I mean to cook with, drink or wash with.

Cross-examination.

(By Mr. WIMBERLY:)

Q. From '94 to '99 you spoke of the fire department, what fire companies did you belong to?

A. This one up town.

Q. That's the only — you speak of not being kept up—organized?

A. That's the only one I know anything about.

Q. The Mechanics was kept up all right?

A. I don't know anything about that. They were at the Variety works, independent of their own.

Q. You are only testifying about the up-town company?

A. Yes, sir.

Q. What about the negro company?

A. The negro company there was nothing to it. My best recollection is that they had this little thing called the Joe Brown for awhile that they worked with.

Q. Speaking about '95, '96, '97, '98 and '99?

854 A. I know the negro company was mostly used——

Q. They had quit using the Joe Brown for several years?

A. I don't know positively. The negroes were used mostly for getting up the hose and pulling the reel.

Q. They were very active—regular in their attendance?

A. Yes, sir; some were better than some of the whites.

Q. Some of the best firemen you had were in the negro companies?

A. Yes, sir.

Q. The Variety people were first rate firemen, were they not?

A. Colonel, I can't state anything about the Variety people.

Q. You didn't keep up with them?

A. No. They had a company down there I know. At the same time their officers were elected the company was up here. All met together.

Q. You knew as chief of police they had their exemptions?

A. Yes, sir; exemption from street tax.

Q. That was true during all the years you were chief of police?

A. I don't remember. The company up here disbanded but I can't remember what year it was.

Q. It was '98 and organized with Mr. Frank Clark—Fred Clark——

A. No, sir. When I was elected chief of police I don't remember whether I still remained a member of the fire company or not.

Q. There was never a year when you were chief of police but what certain persons were exempted from street tax by reason of belonging to the fire department?

A. I could not state positively about the last year, unless I looked over my books. They had some little disturbances——

Q. The last year was '99?

A. Yes, sir.

Q. That's the year you had the paid department?

A. Yes.

Q. You are not sure about that year but you are sure about every other year you were chief of police?

A. No. I say they had some little disturbances some way
855 or another about the company down here, I think.

Q. About what?

A. I don't remember what year it was in. I was ordered to collect street tax out of some of them. I don't know whether they elected new members or not. I can't say about that.

Q. Ordered by who?

A. The chief of their department. If a man didn't attend to his duty he was reported to me and I would collect his tax out of him.

Q. The chief of the department?

A. Yes, sir.

Q. You always obeyed the orders of the chief of the different companies, isn't that right?

A. In regard to their reporting to me not being a member of the company, I would collect street tax out of them. Not only my duty to them but my duty to the city.

Q. The water of the Dawson Waterworks Co. was used at all the fires—fire plugs?

A. Yes, sir. I think probably on the occasion of the hotel fire around here they used the cistern at that time.

Q. Used the fire plugs also?

A. Yes, sir.

Q. The only time you remember their using anything from the cisterns, isn't it?

A. I believe it is, sir.

Q. As I understand the McClellan fire was ruled out? (Addressing the master)

The MASTER: I will let you cross-examine him on that, Mr. Wimberly.

Mr. WIMBERLY: Very well, without waiving any rights.

Q. As I understand, the McClellan fire was at night, three o'clock in the morning?

A. I didn't state what time of night it was.

Q. That is a fact?

A. Yes, sir; I think so. I don't remember exactly. I live right at the McClellan house and quick as the alarm was given, I got up and ran down there.

856 Q. It was dark?

A. Yes, sir.

Q. Sometime between midnight and light—dark part of the night?

A. Yes, sir. I don't know about the moon shining.

Q. You never counted the section of hose, did you?

A. Well, sir, I can't say positively that I did. I said to the best of my recollection there was only three sections of hose there.

Q. You would not be positive there was not more than three?

A. Could not say, only they had no use for them.

Q. I am speaking about what you know, not what you had use for?

A. Yes, sir.

Q. In the dark?

A. Yes, sir—light—the fire give light.

Q. It was night—part of the hose lay down in a shadow—of course it was dark beyond the fence?

A. No, sir. Nothing but a little picket fence between the street and the fire.

Q. How far did you live from the engine house that night where they kept the hose?

A. I live in Mercerville and the engine house is down here.

Q. How far was it?

A. Something about three-quarters of a mile.

Q. You first came down here, didn't you, after the alarm was given?

A. I have got that mixed up a little, Colonel. It was the Grier fire that I came down here. That fire I didn't come down here at all. The two houses burned in about a week of one another. When I said I came down at that fire I was mistaken.

Q. You said that you and Mr. Baldwin carried the reel down there?

A. No, sir; that was Mr. Dean's house.
Q. Do you know how many sections of hose were on the other line?
A. No. Not a great ways there to either plug.
Q. The city had very little, if any, hose 30 feet in length?
A. I don't know about the length of the hose.
857 Q. Would you be positive that they had any 30 feet in length?
A. No, sir.
Q. Don't you know as a matter of fact that the hose the city had was 50 feet in length?
A. No, sir. I don't know whether they had any fifty.
Q. If they had any 30 feet length do you know it?
A. No, sir; I never measured the hose. I never knew anything about that at all. I had worked with them a good deal but never thought about the length of the hose.
Q. When did you measure the distance from this plug to the house?
A. When?
Q. Yes?
A. I can't tell you; but it was a few days after the fire. Same year of the fire.
Q. How many feet was it?
A. 100 feet actual measurement. Measured it with a tape measure.
Q. To the nearest corner of the house?
A. I think that's right. Nearest place could get to the house.
Q Anybody help you measure it?
A. Yes, sir; Mr. Frank McNulty was with me.
Q. He and you measured it together?
A. Yes, sir.
Q. It was dark and you could not tell anything about the condition of the hose at that time of night?
A. The only thing I could tell about the hose it wasn't leaking.
Q. You didn't see them leaking?
A. No, sir; and I was around it.
Q. Did you watch it closely?
A. No, sir; wa-n't thinking about it.
Q. You were not paying any attention to the joints of the hose?
A. No, sir; if the joints of the hose had been leaking, somebody's attention would have been called to it and tried to bind it up. Always had spanners for that purpose.
Q. You didn't notice whether it was leaking or not?
858 A. No, sir.
Q. You didn't notice whether it was old hose or new hose?
A. No, sir.
Q. Did you measure how far apart the different hydrants were?
A. No, sir—from one hydrant to the other, no, sir.
Q. You say there were as many as three different lines used. Are you positive there were not more used than three?
A. No, sir. I think first we hitched a line of hose to this plug in

front of Mr. Parks and moved that line of hose from in front of Colonel Parks up in front of my house, thinking it was nearer.

Q. This was out beyond Col. Parks was it?

A. Yes, sir.

Q. And that was moved further out?

A. Further out towards the fire.

Q. Did you notice in moving it whether they took off any lengths or left it as it was?

A. Rolled it up.

Q. If they took off any lengths you have no recollection of it?

A. No, sir.

Q. Did you count the lengths at all?

A. Did not.

Mr. WIMBERLY: I move to rule out this testimony.

The MASTER: I am going to let it in for the present, subject to the right to rule it out later on.

Q. Isn't it a fact that all the hose that the city buys here comes in lengths of fifty feet; and where it is shorter is due to the fact of its being old hose and becomes defective and part of it is cut off?

A. I don't know a thing about the hose. Not a bit more than the man in the moon. Don't know a thing in the world about them. Never paid any attention to it; never saw them measured and never knew what length the hose was.

Q. You don't know anything about it?

A. Not a thing, sir, in regards to the length.

859 Redirect-examination.

(By Mr. GUERRY:)

Q. The witness wanted to explain something: What was that you wanted to explain?

A. I think you misunderstood me when you asked me about cutting off the hose. I think he misunderstood me about moving the hose from in front of Col. Parks' house. The hose was moved from there across to another street. The hose in front of Parks' house was never moved from the time the fire started—Littleton house.

Q. You say you were marshal in '97, '98 and '99?

A. I think those are the years I served.

Q. During that time do you remember any experience you had at the branch of the source of the waterworks?

A. Yes, sir; some complaint was made to me about something stinking up there.

Q. Tell about that?

A. And Mr. Horsley and I went up there.

Q. Which Horsley?

A. J. A. Horsley, superintendent of the waterworks. We went

up there and in about 50 yards above the spring they get their water from same drain, we found a dead horse.

Q. Was that above or below the mouth of the inlet pipe?

A. Above.

Q. The stream you speak of, is that the stream that runs into the inlet pipe?

A. Yes, sir.

Q. Where was this horse?

A. Right on the edge of the banks of the stream.

Q. What portion was lying in the water?

A. His tail.

Q. You mean his tail—rump?

A. His rump.

Q. What was the condition of that dead horse?

A. In a very bad fix.

Q. How did you find that out?

860 A. As I stated they complained to me about something smelling up there and we went up there and saw what it was.

Q. What happened when you pulled him out?

A. He was rotten. The hide and stuff would slip off.

Q. Who was there—did you do it?

A. A negro, made him do it.

Q. Was Mr. Horsley there at the time?

A. At the time he was pulled out? He was *the horse* time he was there; but I don't know whether he saw the horse pulled out or not. Think he made the negro do it.

Re-cross-examination.

(By Mr. WIMBERLY:)

Q. Mr. Horsley went to you as chief of police and asked you to have the horse moved?

A. I don't remember whether Mr. Horsley made the complaint to me or not. I think the complaint was made by somebody; and Mr. Horsley went up there hunting for it. Didn't know at that time it was up there.

Q. Didn't Mr. Horsley ask you to have it moved?

A. I don't think Mr. Horsley knew it was there until that day he went up there and hunted for it. The complaint probably was made to Horsley and me and Mr. Horsley went together.

Q. You kept up with the charter limits of the city and the duties of the chief of police?

A. I tried to, yes.

Q. You knew during that time that the protection of the water supply was by an act of the legislature part of your duty?

A. Well, sir, I don't know as I knew it.

Mr. GUERRY: That is a matter of law.

Mr. WIMBERLY: I want to show it as notice of his duties.

Q. You didn't know that was the law?

A. I can't state whether I knew it was the law or not. I knew it was my duty to move it as soon as I found it there.

Q. You didn't know it was your duty to protect the supply
861 up there?

A. I didn't know I had to go up and down the branch up there. In the event complaint was made to me I should go out and look after it.

Q. You knew it was outside of the city limits and your jurisdiction was due to that law?

A. Outside of the city limits?

Q. Yes?

A. Well, sir, I can't state that it was outside of the city limits.

Q. You didn't even know that?

A. I think it was near the line of the city limits. Might probably have been—yes, it was out of the city limits probably 40 or 50 feet.

Q. You made one correction about moving the hose from the plug at Col. Parks, prior to that there were three fire hydrants on the same line in use?

A. No, sir.

Q. Wasn't there two additional ones in use?

A. No, sir.

Q. Wasn't there one at Judge Griggs'?

A. Yes, sir.

Q. And one at Littleton's?

A. Yes, sir.

Q. And one at Col. Parks'?

A. Moved that one.

Q. Before you moved it?

A. They moved that from Col. Parks' house to mine, thinking the plug was nearer. Don't think there was a bit of water——

Q. Before they moved it there was a hose line at Col. Parks' and one at Littleton's and at Judge Griggs', isn't that true?

A. Yes, sir.

Q. All these are on the same street, Lee street?

A. Yes.

Q. After they moved it they moved it up to your house?

A. Yes, sir.

Q. When they got it to your house wasn't it still on Lee Street main?

A. No, sir; different street—further over.

Q. Do you know how the mains run?

A. No, sir.

Q. Don't you know that is the same main?

A. I know the main that runs up my street ends at my house.

862 Q. Don't you know that is part of the same main?

A. Don't I know it?

Q. Don't you know that plug over at your house is all a part of the same main that goes up Lee street and then branches across?

A. If it does it comes from this way.

Q. You don't know whether it is the same main or not?

A. No, sir; I know it is a different street, that's all I know.

Q. There is no main on 4th avenue—there is not but one main out there, turns at the corner and goes around?

A. No, sir; if I am not mistaken Mr. Horsley has been working there all the week and there is a hydrant setting right out this way (illustrating).

(By Mr. GUERRY:)

Q. You know there is a main that runs on 4th avenue in front of your house and ends there?

A. Yes, sir.

Q. That is the one you have testified about?

A. Yes, sir; that is the one I have been testifying about they moved the hose to.

F. M. McNULTY, sworn by the respondents, testified as follows:

(By Mr. GUERRY:)

Q. How long have you lived in Dawson?

A. Since '81.

Q. You were alderman at one time, were you not?

A. Yes.

Q. Do you remember this McClellan fire?

A. Yes, sir; remember it very well.

Q. What year was that?

A. I don't remember the year. I remember the fire very well.

Q. Do you remember more than one?

A. Yes, sir; I remember the one in which the kitchen burned and the house burned. Had the kitchen to catch——

Q. This is when the house burned?

A. Both.

833 Q. You were at both?

A. Yes, sir.

Q. Do you remember using the water from the hydrant on 4th avenue that night?

A. I don't remember anything about 4th avenue. I was on Lee street.

Q. The Littleton plug, is that the one you are talking about?

A. Yes, sir; right on Lee street.

Q. How far was that plug from the house—the McClellan house that was afire?

A. I suppose about 100 feet, sir.

Q. Who turned the water on there that night?

A. I won't be positive, but I think I did.

Q. State whether you turned it on properly or not?
A. Yes, sir; I know the one I was at I did. I think I was at that plug.
Q. Do you remember the length of the hose?
A. No, sir; I do not. I don't think it was over 100 or 150 feet. No they didn't have any hose to spare. Tried to get three streams of water, I think it was, on the house.
Q. About how long would you say the hose was according to your recollection?
A. Not over 150 feet, sir. Don't think there was over 100, though I won't be positive.
Q. What size nozzle did the city have?
A. They had an inch nozzle. Some three-quarters of an inch.
Q. This was a city nozzle?
A. Yes, sir; suppose it was.
Q. Do you remember how the pressure performed on that occasion?
A. Yes, sir; wasn't any pressure.
Q. How high did it throw the water?
A. Well, it was a one story house——

Objected to on same ground.

Q. About how high?
A. Well, just about up on the eaves of the house.
Q. How high was that from the ground?
A. 12 or 15 feet, don't know exactly. Not over that.
864 Q. You tried to throw the water up there?
A. Yes, sir.
Q. Why couldn't they?
A. Suppose they didn't have pressure enough to go up. Wasn't force enough behind it.
Q. What was the condition of the air at that time, quiet, still or otherwise?
A. I don't remember exactly. Don't think there was any disturbance though in the air.
Q. That on one of the principal streets of the city?
A. Yes, sir.
Q. How near did they get to the house in trying to put out this fire?
A. Got right up on it after they got a breastworks.
Q. Explain what you mean by breast works to the court?
A. Got an old door and held it up in front of the men holding the nozzle.
Q. For what purpose?
A. To keep the fire from burning them up.
Q. Got as close as they could that way?
A. Yes, sir.
Q. Could they then throw the water with this hose on top of the building?

A. No, sir; never did get the water on top of the building from the side I was on. I don't know what they did on the other side.

Q. Do you remember a test made by Mr. Horsley and others in '97?

A. Dock Melton's?

Q. Yes?

A. I was there.

Q. Do you remember who was present besides yourself?

A. Andrew Baldwin was present and Mr. Horsley. I remember those two. I don't remember who else was there.

Q. What sort of hose did they have on that occasion—what length of hose?

A. Had 100 feet of hose and 50 feet.

Q. Did you make a full and fair test?

A. We thought so.

Q. How long were you engaged in it?

A. I don't remember. About 30 minutes or an hour.

865 Q. Was Mr. Horsley present during that time?

A. Yes, sir; I went out there with Mr. Horsley.

Q. How come you to go with him?

A. By request.

Q. Whose request?

A. His.

Q. Were you then an alderman?

A. No, sir.

Q. Were you an alderman when you participated in these McClellan fires?

A. No, sir. I think I was elected after that.

Q. Who conducted this test when it was made with this new 100 feet of hose, the time you speak of?

A. Mr. Horsley, Mr. Baldwin and I think Dr. Cheatham, won't be positive. I know Mr. Horsley——

Q. What was the condition of the air at that time?

A. Very calm.

Q. What sort of nozzle did you have?

A. Had an inch nozzle.

Q. Was the water turned on full or not?

A. I suppose so. The superintendent of the waterworks turned it on.

Q. Who did?

A. Mr. Horsley.

Q. Was the water thrown vertically on that occasion?

A. Threw it every way.

Q. Was it thrown vertically?

A. Right straight up?

Q. Yes?

A. Yes, sir.

Q. How high did it go when it went its highest?

A. I suppose 25 or 30 feet the highest it went. I know it didn't go to the electric light wires.

Cross-examination.

(By Mr. WIMBERLY:)

Q. To refresh your recollection, didn't it go five feet more or above the top——

A. No, sir.

Q. Did not?

A. No, sir.

Q. If the others say so they are mistaken?

A. That's my opinion, sir. Can't say about anybody else. That's the way I saw it.

866 Q. Did you measure it?

A. No, sir; never measured it. Could not measure it straight up. That's my judgment, sir.

Q. You say—coming back to the McClellan fire, that they used three——

A. I won't state positively what they used there. I don't remember. I know they used the hose and don't think they wasted any. About 100 feet from the plug to the fire.

Q. Did you measure it?

A. From the plug to where the house burned?

Q. Yes.

A. Yes, sir; once.

Q. When?

A. After the fire. I don't remember when.

Q. Do you remember what the measurement showed?

A. About 100 feet, I think.

Q. Don't remember, now?

A. Not positive just now about that.

Q. Do you remember how many sections of hose there were in that line you speak of?

A. No, sir; do not.

Q. Did you notice the kind of hose?

A. No. They were fire hose belonging to the fire department.

Q. As to whether they were new or old?

A. Wasn't likely that I would examine them on an occasion like that.

Q. Who turned it on the fire?

A. I don't remember. I turned one plug. I don't know who turned on the other.

Q. Don't you know anything about the length of the other lines?

A. No, sir.

Q. Didn't measure those at all?

A. No, sir. I know they took up a line from down at Col. Parks'. I don't know where they put it.

Q. They took it up and put it at another place?

A. I don't know, sir. I didn't go with them or where they were.
Q. The one they took up at Col. Parks', is that the one you speak of as being attached at Littleton's?
A. No, sir; didn't move that one.
867 Q. That was not moved?
A. Not while I was there.
Q. Were you there the whole time?
A. There until the house fell in.

The hearing was then adjourned until the next day at 8.30 a. m.

Fourth day, Thursday, March 13, 1902.

The hearing was resumed pursuant to recess.

J. W. F. LOWREY, sworn by the respondents, testified as follows:

(By Mr. GUERRY:)

Q. You are the present mayor of the city, I believe?
A. I am.
Q. How long have you resided in Dawson?
A. A little over two years.
Q. Resided in Dawson?
A. Sir? Resided in Dawson?
Q. Yes?
A. Nearly 30 years. Thought you said presided in office.
Q. Do you know the location of the waterworks company's plant?
A. I do.
Q. Do you know about the grounds and surroundings where the pumping station is located?
A. I do.
Q. Have you seen the source of supply of water?
A. I have.
Q. And the arrangement by which it is conducted into where it is appropriated by the company?
A. Yes, sir.
Q. Have you examined all those premises?
A. I have examined the premises up to as far as any spring is designated.
Q. As far as what?
A. As far as any spring was designated from which water was to be used to supply water to the town.
Q. Which spring is that?
A. The Dunn spring.
Q. Is that the original source of the branch—does the
868 branch extend beyond that?
A. The branch extends a great ways beyond that.
Q. What is the character of the land and the surface of the land through which this branch runs and in which the springs are located above the waterworks company?

A. It is a dark, murky, muddy swamp; and the conformation of the land, especially on the west side is situated so that all the washings from 6 or 8 residences and the other houses of the residences are necessarily thrown into this branch. They could not go any other way, unless they were carried off by some external force. The natural drainage from this place is right into this swamp; and I think for miles above that the same thing is true. Now then this branch extends——

Q. On this same bottom?

A. Yes. This branch extends at least two miles.

Q. Above the pumping station?

A. Yes, at least that far; and I think the whole of that distance the water on either side, running from all sources, is carried into this branch. That drainage is contaminated by the surface waters from privies, horse lots——

Q. Any butcher pen?

A. Yes, a butcher pen. The driftings from these places all run into this branch.

Q. What other matter did you find—find any vegatable matter in the swamp?

A. The whole swamp is very largely covered with vegatable matter. That is especially true of the swamp above Dun- spring. That is a very thick swamp. Below Dunn spring the trees may have been cut down, which in my opinion operated against the plant——

Mr. WIMBERLY: I object to his giving an opinion. He is not an expert.

Q. What has been done by the waterworks company to protect these springs or their outlets or this branch at the—above the
869 mouth of the inlet pipe, which leads into their waterworks?

A. Nothing whatever.

Q. What protection is there to prevent the flowing of the surface water from these settlements that you have spoken of along the hill on the west, into these springs and other branches and the main branch above the inlet pipe?

A. Nothing to prevent it. It is an absolute fact that all those waters do flow into that place.

Q. On the east side, do you know about that?

A. I am not so familiar with the surroundings on the east side; because it was not so convenient to examine. I have never put myself to the trouble to go up on the east side and examine that land. I know on Mrs. Sharp's plantation, which is some distance above there—I don't know how far, the branch water from her farm houses run into that. I know that to be a fact. She does not own the place now. It is known as her place; but Mr. Cox owns it now.

Q. Professor, have you had in your family, or otherwise, any considerable experience with this water of the waterworks Co. since its location here?

A. As much as is possible for a family to have, I suppose. I have had the water in my house and in my yard since the beginning.

Q. Well, since the beginning what sort of water has it been?

A. It has varied.

Q. Describe it to the court?

A. In dry weather the water is clear and apparently fit for use; and but for the fact that we knew of the contaminating sources from which it came, we might use it for drinking purposes. I have never used it for that purpose because of the source from which it is brought. Sometimes it is very nice for bathing and frequently it is wholly unfit for bathing.

Q. What is the trouble with it when it is unfit?

870 A. Permeated with mud, as red as mud can make water by flowing into it.

Q. How much has that been—how much of the time has that been true during all these years?

A. I could not tell you what proportion of time. I know this: we have not had a rain here of any consequence in 8 or 10 days—last week sometime, and the water has not cleared up from it yet.

Q. It was week before last you had your rain, wasn't it?

A. Thursday night.

Q. About 10 days ago?

A. Eight or ten days ago.

Q. How have you tried to use the water in your family?

A. For bathing purposes. We have bath-tubs and use it when we can, almost all the time—generally use that in the bath-tubs. I have on several occasions filled the bath-tub with water and it was so bad I would not use it. Let it out again. That occurred several times. Use it almost every week for bathing purposes. It is very objectional, still we have no other source from which to get bathing water and we use that.

Q. Is it fit for laundry purposes?

A. Not at all, sir, I don't think. Never heard of anybody using it for laundry purposes.

Q. What about cooking with it, suitable for that?

A. Hardly suitable; still, we use it for that, boil it, by that means we hope to destroy the germs—disease producing germs that might be in it. We boil the water and use it for cooking because it is so inconvenient to get other water. Some have built an artesian well in our neighborhood, because of the fact that it was unfit for use for drinking. We had to have drinking water convenient so several of the neighbors joined in and dug us an artesian well. That has been done by two or three others in town that I know of, may be three.

Q. Three besides you?

871 A. Two besides mine, I think. I say mine, it belongs to the neighborhood. It is not mine.

Q. The one you use I mean?

A. Yes, sir.

Q. You are familiar with this enterprise here, how it originated?

A. The Dawson Waterworks enterprise?

Q. Yes?

A. Yes, sir; I am familiar with the conduct of the people—what took place at the time. A vote was taken in regard to waterworks, if that is what you speak of.

Q. At that time was this scheme voted on or mentioned at all?

A. No, sir; not dreamed of. We had had in contemplation here——

Mr. GUERRY: You need not go into that.

Cross-examination.

(By Mr. WIMBERLY:)

Q. You are one of the two or three that Dr. Cheatham mentioned that were originally opposed to any waterworks?

A. No, sir; not any waterworks. I was one in favor of enjoining this company right in its incip-ency, before a lick had been struck—before it had been extended that contract, as being exorbitant, outrageous and unfair.

Q. You didn't do it?

A. I didn't do it because I was a poor man myself; and I did not meet with as much encouragement as I thought it demanded.

Q. You didn't let the company know that you opposed it?

A. Told Dr. Cheatham, our mayor—yes, told him about it.

Q. You didn't tell the waterworks company?

A. No, I did not. Didn't hardly know who the waterworks company was. Bennett was here. I didn't think he was much waterworks company.

Q. When the waterworks were being built you never notified anybody connected with it of your opposition?

A. Only through our officials, that's the only way.

Q. Not speaking about notifying your officials, the waterworks people?

872 A. Had no conversation with them at all, I don't think.

Q. Any notice of any kind ever given them?

A. Not from me. Our conversation was—my conversation was among our people here. I wanted them enjoined and not issue any rights—wanted it stopped.

Q. You were, I believe, a party with Mr. Carver in the bill that was brought in June '94?

A. Yes, sir.

Q. You were the Lowrey, I mean?

A. Yes, sir.

Q. Do you know who paid the attorneys that brought that bill?

A. No, sir; I do not.

Q. It was brought by the city attorney and his partner?

A. I don't even know that. My understanding about that was that Col. Guerry and Mr. Laing were employed.

Q. Employed by who?
A. I don't know.
Q. You didn't employ them?
A. No.
Q. You merely loaned them or allowed them the use of your name?
A. Yes, I was anxious to do it. Had been for years.
Q. At the request of the city?
A. No, the city didn't request me anything about it. I found an opportunity had arisen for us, a long time coming but better late than never. My recollection is that Mr. Carver approached me about it.
Q. A. J. Carver?
A. That is my recollection.
Q. You have been mayor how long?
A. Little over two years.
Q. Are you a physician or a chemist?
A. Well, I am a poor chemist and not much doctor.
Q. Did you ever make an effort to analyze this water?
A. No, sir.
Q. While you were mayor ever have it analyzed?
A. Did not, sir. This suit has been pending ever since I was mayor and before.

873 Q. You spoke about having some artesian wells: at the time this source of supply was adopted, the only artesian well that had been tried in the city proved a failure?

A. I am not prepared to say that. For the last week or two and only until then, there has apparently been some defect about that artesian well. We have used water for years from the well from its beginning.
Q. That artesian well, when did you commence using that?
A. Here in the city?
Q. Yes?
A. Right from the beginning of it. Never used this branch water.
Q. The artesian well you use was built after the waterworks?
A. No, the artesian well, it was before the waterworks. This artesian well in the city was built before.
Q. That is not a flowing well, is it?
A. No, sir. Lifted by a pump.
Q. You have never at all gotten any flowing artesian well supply in the city thus far?
A. No, sir; The water is lifted from all of them by pumps.

By the COURT: What is the object of this?
Mr. WIMBERLY: I won't pursue it further.

Q. You spoke of the Sharp place out here on the east side, how far are the buildings on the Sharp place from the pumping station?
A. Little over half a mile, I suppose, may be three-quarters.

Q. It was there when this water supply was selected, wasn't it?
A. It was.
Q. These other houses, they were all there when this water supply was selected, were they not?
A. Most of them were there. Some might have been built since then. I don't remember. We had a storm that blew down several, but they have been rebuilt.
Q. Other houses above?
A. Other houses there.
Q. If they were replaced, it was replacing the same that
874 were blown down, isn't that true?
A. Yes, sir. Some of them might possibly have been built since then.
Q. As far as you know they were all there?
A. As far as my individual knowledge goes.
Q. They are not using that butcher pen now?
A. Only know what they tell me. Didn't have any stock in it this week. He is down town in business.
Q. Hasn't the proprietor moved away and sold his property?
A. My understanding is he has bought it.
Q. There is no butcher pen being used out there now is there?
A. He told me he was using it.
Q. Not asking you what he told you?
A. There were no cows in it.
Q. Haven't you seen the butcher pen?
A. Yes, sir.
Q. Any signs of its being used?
A. Not immediately.
Q. You have not seen them using it in sometime, have you?
A. Never did see them in absolute use of it.

Mr. WIMBERLY: I will ask your honor to rule out what he has said about the butcher pen, he never saw them using it.
The MASTER: I rule out the statement that he was told that it was used.

Q. That pen, how far is it from the source of supply—the inlet pipe?
A. It is above the Dunn spring.
Q. Quarter of a mile from the Dunn spring, isn't it?
A. I think not.
Q. About how far, can you give an idea?
A. 150 yards, possibly—from 100 to 150.
Q. You have never noticed the drainage from the butcher pen as to which way it goes?
A. I did.
Q. When did you notice it?
A. Yesterday morning.
Q. It is not on a hill at all?
A. Yes, sir; on the side of a hill.

875 Q. It is in a bottom, isn't it?

A. No, sir, rather an elevated place. Runs off from that into the drainage.

Q. I believe you say the water is clear and apparently all right in ordinary weather?

A. Yes, sir; in dry weather the water is clear and apparently good for use.

Q. You say apparently, you have never had it examined or analyzed to know that it is different from what it appears?

A. No, sir; only on the idea of common sense and knowing the source.

Q. Your ideas are in the absence of a test or analysis: you are not a man, that is, an expert, know anything specially about what is known as the germ theory—you have never studied it?

A. No, I don't know a very great deal about it, as a matter of course——

Q. You have your own ideas?

A. I have read a good deal about it. As a matter of course I suppose every man who reads has read about it.

Q. You speak of its not clearing up entirely since the rain of a week or ten days ago, that was a very unusual freshet?

A. Very severe rain, sir.

Q. Probably the biggest rain they have had in this country for 30 or 40 years?

A. Don't think it is the biggest one we had. I think we had some last spring equally as great as that.

Q. It is recognized as probably the biggest rain in this country?

A. Not in this immediate section it is not so recognized. Above here may have been.

Q. Known as very exceptional freshet?

A. In some sections of the country; but that does not apply to Terrell county.

Q. Wasn't it as hard rain here as in other sections?

A. I think not. Every man I have seen or questioned from other sections report more devastation. Our bridges were not
876 washed away and our lands not destroyed. The destruction of property was not as great as in other places.

Q. You state that your property was not destroyed as badly as in other places, you have no river in Terrell county?

A. No, sir.

Q. No large stream in Terrell county?

A. There is one large stream that borders on the county, Kinchafonee creek. It is a large stream. The bridge there were not washed away.

Q. The county is a very level county and the washing qualities are not as big as in other portions of the State?

The MASTER: I think you have brought out that fact that there were very heavy rains.

Q. When did you build that artesian well in your yard?
A. Last year.
Q. Mr. Griggs' yard?
A. Last year.
Q. Up to that time you did use this water for drinking purposes?
A. Which water?
Q. The waterworks water?
A. Never used a drop of it. Took water from this pump down here.
Q. The artesian pump?
A. Yes, sir; what we call the artesian pump.
Q. Town pump?
A. Yes, sir.
Q. This swamp that you speak of, it is not more thickly settled on the branch than other running streams in the county, is it?
A. I think so. It is very considerably more; because it is a suburb of the town, one section of it.
Q. Unless you go out a considerable distance, you could not get a stream where the settlement was of less thickness near town?
A. We have no stream in the town on which settlements are located like that.
Q. No stream in the town at all?
A. Except on the same stream. It is not thickly settled below here.
877 Q. It is the same stream?
A. Yes, sir.
Q. Of course the higher up a stream the purer source you get?
A. Yes, sir. That is a suburb of Dawson, you know.
Q. How far is it from the city?
A. Just outside of the city limits a little bit.
Q. How far from here?
A. Just a fraction over a mile.
Q. You speak of its running a couple of miles, it is above the city—that branch?
A. Yes, sir; a little northwest of the city.
Q. It is not thickly settled all the way up the two miles?
A. No, sir; not all the way up.
Q. Only a short distance up from the pumping station?
A. Really this thick settlement is only a short distance. I suppose the main part of it is within a quarter of a mile of each other—as near as possible.
Q. These six houses you speak of is what you mean by being thickly settled down there—there are six houses on what you might call the watershed of that branch, is that right?
A. I hardly know how far that water does run.
Q. The houses you speak of as being thickly settled, you refer to only about six houses?
A. Two or three of them are below the Dun- spring and two I think above the Dunn spring.

Q. When you speak of its being thickly settled, you mean six houses, don't you?

A. Those are more closely together than the others.

Q. Some below the spring and some above—scattered along the hill side?

A. Yes, sir; some are below the Dunn spring and some above it.

Q. Are they in a bottom or up on a hill?

A. On a hill.

Q. Near the dividing reach?

A. The front yards are just about on the divide. The rear of the houses, the part on which the privies are located, are on the
878 side that flows into this branch.

Q. Some of the houses are across the road?

A. None of these that I am referring to.

Q. The five or six that you refer to are on this side of the road?

A. Yes, sir.

Q. You say several times this water got muddy: you mean several times during the ten years, or such a matter, that you have had it in your house, about that long?

A. I suppose I have had it very nearly ten years. I took it at the beginning.

Re-direct examination.

By Mr. GUERRY:

Q. You mean by artesian wells, these wells — have been bored but don't flow up—have to be pumped?

A. Yes, sir; the water rises up near the surface and then it is pumped out—lifted out by pumps.

Q. Where does the business part of the city get its drinking water?

A. The business part of the town?

Q. Yes, sir?

A. Almost altogether from the pump here at the corner.

Q. That the city artesian well you speak of?

A. Yes, sir; it is called an artesian well.

Q. About this butcher pen, did you look at it?

A. Yes, sir; I did, went through it.

Q. Could you state from what you saw that it had been used as a butcher pen in the past?

A. All the evidences there to show that it had been used.

Q. What?

A. A rack.

Q. How had it been used?

A. To butcher cows.

Q. How else, was there a pen there—enclosure?

A. Yes, sir. I imagine for keeping cattle in. I don't know about that. That's what I imagine.

Q. There was an enclosure and arrangements for keeping
879 and slaughtering cattle?

A. Yes, sir.

Q. How long had that been there?

A. I can't tell you that. Evidences are that it has been there for sometime. I don't know.

Q. Don't you know how many years?

A. No, sir; I don't know.

Q. What was the size of the pen—enclosure?

A. I suppose it was fully 100 feet around it—100 feet in diameter.

Q. Where did the drainage from that pen go—what particular part——

A. It went into the branch above the Dunn spring.

Q. Now when was — that this water was muddy, was it usually muddy, was it during freshets or in ordinary wet weather?

A. Any ordinary wet weather it is muddy. After every rain it is muddy—any rain of any consequence.

Recross-examination.

(By Mr. WIMBERLY:)

Q. You spoke of seeing signs of its being used, the only signs you saw was where they had been pulled?

A. Yes; and the ground there over which they seemed to have roamed, you know, all around.

Q. You saw no signs of blood, anything of that kind to indicate there had been any butchering?

A. No, sir; I don't think I did.

R. F. SIMMONS, sworn by the respondents, testified as follows:

(By Mr. GUERRY:)

Q. How long have you lived in Dawson?

A. Forty odd years.

Q. You have been a practicing lawyer in the city how long?

A. About 30 years, except when I was off in the Confederate army.

Q. Do you know where this waterworks is located?

A. What part do you mean?

880 Q. The pumping station?

A. Yes, sir.

Q. Where it gets its water from, you know the place where it gets its water from?

A. Yes, sir; I know the creek very well.

Q. Do you know anything about a butcher pen anywhere near this place?

A. Yes, sir; I know there is a butcher pen 2 or 3 hundred yards from where the road crosses the creek.

Q. What direction is it from the pumping station?
A. Northwest.
Q. Is it above it or below it?
A. I don't know whether it is above or below the spring.
Q. I didn't ask you about the spring?
A. Yes, sir; it is above.
Q. Above the waterworks station?
A. Yes, sir; northwest.
Q. It is above it—up the stream, you mean?
A. Yes, sir; the stream runs generally from the north sorter south and this is northwest.
Q. How far is it above the pumping station?
A. Two or 300 yards, perhaps more. I don't know exactly the distance. A man may be mistaken about distances.
Q. Where is it situated with reference to the bottom through which the branch runs?
A. It is up on the hill, just to the right of the road as you go from here, northwest.
Q. Which way does the drainage from that butcher pen run the way it is situated?

The MASTER: Is there any issue as to the existence of the butcher pen?

Mr. WIMBERLY: No, sir; my understanding is that there is a small butcher pen there. About the drainage, never had it examined and not prepared to say about that, as far as I now know.

The MASTER: Proceed.

Q. Do you know the way the drainage runs from where the
881 butcher pen is located?

A. I never looked at it with a view of determining that. On the north there is a hill and it could not possibly go in that direction. There is a pond there. I don't know of any way that it could go except towards the creek—towards what we call the spring over there.
Q. Which spring?
A. The Dunn spring, they call it, I believe.
Q. Do you know whether that butcher pen has ever been used or not?
A. Yes, sir.
Q. How?
A. Been used as a butcher pen.
Q. How do they use the butcher pen?
A. They have a house there on it and they hang up a beef—cattle and butcher them. I have seen them butchering for Mr. Adams several times. Been out there and seen him butchering. A large lot, I suppose an acre or so, around the place; and there is a pond where they throw the offal to the hogs. I have seen hogs eating it. Kept hogs there.
Q. What, offal?

A. Yes, sir. To some extent it has to flow into the creek. I don't know, I never examined that. I am of the opinion that it could not go any other way except that way. I think that's correct.

Q. How long has that butcher pen been there—about how long?

A. Really I could not say. It has been there some little time.

Q. About how many years?

A. I don't know. Two or three years, may be more.

Q. What sort of a supply was that pen used for, private family—just for the place there or for the city?

A. He kept a market here in town and supplied the town to some extent. Two or three of them. That is one of the butcher pens that supplies the city with meat.

882 Cross-examination.

(By Mr. WIMBERLY:)

Q. When did you see the cow butchered that you spoke of out there—the beef?

A. I could not designate the time. I have seen it several times. Bought beef from Mr. Adams.

Q. How many times have you ever been out there where you saw the beef butchered?

A. Passed it quite a number of times.

Q. When anything was actually butchered, how often did you see it?

A. I could not say definitely. I have seen him butcher cows. Had a little curiosity one day and I remember seeing how he hung them up.

Q. That one year, two or three——

A. I could not say about that. Don't remember definitely. Had no idea testifying about it. I think it has been going on there 2 or 3 years, may be more or less, I could not say.

Q. As far as your knowledge goes are they still using it as a butcher pen?

A. Mr. Adams is still selling beef here. I could not say of my own knowledge.

Q. Mr. Adams lives here?

A. He lives here and sells beef here every day—every Saturday.

Q. You don't know whether he is still using it as a butcher pen or not?

A. Do not. My information is that he is using it.

Objected to and motion made to rule out answer.
Motion sustained.

WITNESS: He lives there.

Q. Have you ever made any examination to see whether this actually does drain into the watershed or not?

A. No, sir,

Q. Have you ever made any measurements to see how far——

A. No, sir.

Q. Have you ever seen any offal—signs of blood from this
883 butcher pen drain towards the watershed—any signs of it in the watershed?

A. I don't think I have. I have seen it from passing the road at his house.

Q. You saw it at his house?

A. I don't know what you would call it. A little house where he drags them in, you know.

Q. There is a pond there?

A. Pond back of it.

Q. That pond is in another divide—runs off in another direction?

A. I don't know of any way it could get off.

Q. You ever examine it?

A. No, never examined it. My information is—I could not say about that. Never examined it with a view to that at all.

Re-direct-examination.

(By Mr. GUERRY:)

The MASTER: What do you want to show now?

Mr. GUERRY: I want to prove that the water was unfit for use from his experience with it.

Mr. WIMBERLY: I object to the word unfit.

The MASTER: Do you simply want to prove that it is muddy after rains?

Mr. GUERRY: No.

The MASTER: I think that has been sufficiently proven. If you want to go any further very well. You need not ask him about the muddy water. I think that is proven in the case.

Q. Did you ever have any experience in the use of this water?

A. I have.

Q. Water works water?

A. I don't take the water. I consider my well water better than it is.

Q. You have had no experience with it?

A. I have seen it at other places—houses and other places where they take it.

Q. What was the matter with it?

A. I have sometimes seen it when it was muddy.

Q. That all?

884 A. That's all. Of course I could not tell whether it was pure or impure. I have seen it when it was clear and when it was muddy. Taking it altogether, I decided I wouldn't take it.

The MASTER: It is an established fact in this case that the water

is muddy after rains. I am satisfied on that point. Of course if you have——

Mr. GUERRY: But your honor knows somebody else has got to pass on it.

The MASTER: Hardly on the evidence. Of course if you desire, you can put it in.

Mr. GUERRY: I want to show by overwhelming proof, which we have, that the water, on account of its mud and other contaminations, that it was utterly unfit for use.

The MASTER: I don't mean to limit you, if you can show anything else. But in order to save time, I will say that the evidence in this case shows undoubtedly that after rains this water is muddy.

A. M. RAINES, sworn by the respondents, testified as follows:

(By Mr. GUERRY:)

Q. Dr. how long have you lived in Dawson?

A. I moved here in '96.

Q. Do you know this Adams' butcher pen that has been testified about?

A. Yes, sir.

Q. Describe to the master how it is located with reference to this branch that supplies the waterworks company with its water?

A. The butcher pen is located about 200 yards, to the best of my judgment, from the branch that they get their water from.

Q. That above the mouth of the inlet pipe or below it?

A. Above it some 200 or 300 yards. It is up on a little
885 table piece of land, you might say, and the watershed from that place goes to the branch and also to a little pond that is there near it; and that pond is ditched out into the branch coming in above.

Q. Which branch are you talking about?

A. The branch that they get their water supply from.

Q. Where does the drainage from this butcher pen go,—the surface water?

A. Goes to the branch they get their water supply from—the waterworks company.

Q. Do you know whether that butcher pen has ever been used or not?

A. It has been used almost continuously for the last three or three and one half years.

Q. How?

A. Killing cattle and butchering them there.

Q. Where are the cattle kept that are butchered there?

A. Kept right there.

Q. When the cattle is butchered what is done with the offal?

A. It is thrown down there on the ground.

Q. Where it is thrown, where does the drainage—surface drainage go?

A. Goes into the branch that the waterworks Co. gets their water supply from.

Q. How extensively is this butcher pen used or has been used these 3½ years, was it for a private or public market?

A. Butchering place for a public market of Mr. Adams. I have a farm out beyond this butcher pen and I go backwards and forwards to that farm; and I have seen beeves butchered there on various occasions.

Q. Doctor have you had any experience with the water furnished by the waterworks company?

A. I have used the water since I have been living in Dawson—since '96.

Q. What sort of water has it been?

A. It has been very muddy and filthy at various times. Sometimes it would stink—smell bad.

886 Q. Well, from its appearance and from its condition with reference to its odor, could you—I will get you to state whether it has been fit for use while in that condition?

A. Well, you mean for domestic purposes?

Q. Yes, drinking, washing clothes, cooking and to bathe in?

A. We have never drank the water at all. I have been afraid to drink it. We tote water from the artesian well to drink. We cook with it sometimes. At the time it got to stinking so bad we quit using it for drinking purposes.

Q. During those times state whether or not the water was fit or unfit for those purposes or not?

A. It was not.

Q. You say it was not?

A. It was not, yes, sir.

Cross-examination.

(By Mr. WIMBERLY:)

Q. When is the last time you have seen that butcher pen used?

A. Some time in January.

Q. You have been by there several times since then, have you not?

A. I may have been by there once since then on Sunday.

Q. How often do you go by there?

A. As a rule I would go by there often; but have not done it for the last two months.

Q. You made none of the measurements as to the distances—you are just guessing at it?

A. My best judgment as to the distance.

Q. Where is the corporate line: You say you own land near this place, where does the party live?

A. He lives there near it.

Q. In a mile or so of Dawson?

A. Little over a mile, I suppose—probably a mile and a quarter or a mile and a half.

Q. From the court house?

A. Yes, sir.

Q. You are city attorney?

A. Have been for the last year.

Q. And are now?

A. Yes, sir.

Q. One of the attorneys in this case for the city?

A. Yes.

887 Q. You speak of offal, you have never seen any offal except near what you call the pen, have you?

A. No, sir; I have not.

Q. Any signs of it anywhere else?

A. No, sir.

Q. You speak of the water being muddy, that was after a hard rain, wasn't it?

A. Any rain that washes or run on the ground makes it muddy. The water is never absolutely clear. Always got a tint to it.

Q. When you speak of it being very muddy, that is always after an unusually hard rain?

A. No, sir; just an ordinary rain that runs it gets muddy—enough to run.

(By the MASTER:)

Q. You are the city attorney?

A. Yes, sir.

Q. Have they a board of health in this city?

A. No, sir.

Q. Well, who has charge of the sanitary arrangements?

A. I think, not certain, but I think probably the city council has. Probably a committee of that kind. Not certain about that.

Q. This water, is it in the jurisdiction of the city, that is as to its sanitary condition?

A. It is not.

Mr. WIMBERLY: It is by law.

WITNESS: I speak of the city limits.

Q. I mean is it within the jurisdiction of the city—does the jurisdiction of the city extend over this water shed for the purpose of protecting the water supply?

A. My understanding of that law was, that the law gave the city jurisdiction over the property that the waterworks company owned at that time.

Mr. WIMBERLY: The act of 1891 speaks for itself.

The MASTER: What I want to know is whether there was a department of the city that actually exercised jurisdiction out there?

A. As I say, I think the city council has a sanitary committee; but there is no board of health as I understand it.

888 (By Mr. WIMBERLY:)

Q. Isn't it a fact that you have got a board of health and that Dr. J. G. Dean, who testified on yesterday, is now and for a number of years has been chairman of that board of health?

A. I have never understood or heard that the city of Dawson had a board of health.

Q. He is chairman of that committee, isn't he?

A. That's my understanding. He is chairman of the sanitary committee of the city council, as I stated.

(By Mr. GUERRY:)

Q. Isn't that just a committee on water supply in the city council?

A. I could not say, Mr. Guerry.

Q. Where this butcher pen is located, is that in the city or out of it?

A. It is out of it.

Q. Out of the city?

A. Yes, sir.

Q. Is it on the property of the waterworks company or outside of that?

A. It is on the private property of Mr. Adams.

R. J. SEWN, sworn by the respondents, testified as follows:

(By Mr. GUERRY:)

Q. What is your business?

A. Butcher.

Q. Who did you butcher for last year?

A. For myself.

Q. Whereabouts year before last?

A. I butchered out here at Mr. Adams' four months year before that.

Q. Where is that?

A. About a mile out here.

Q. Do you know where the waterworks station is?

A. Yes.

Q. Where was it with reference to that station?

A. What did you say?

Q. Where is the butcher pen with reference to that station?

A. It is on the hill out here about 300 yards.

889 Q. Above or below it?

A. It is above.

Q. How long did you butcher there last year?

A. Didn't butcher any last year.

Q. Year before last?

A. Year before last?

Q. Yes?

A. About four months.

Q. How much butchering did you do?

A. Well, I butchered sometimes three cows a day—one every other day something like that.

Q. What was done with the offal?

A. I left it there; the hogs got some of it and I don't know what went with the balance.

Q. What wasn't used you don't know what went with the balance?

A. No, sir.

Q. Didn't see any other things there eat the balance of it?

A. I suppose the buzzards did.

Q. Did you see buzzards there?

A. Yes, sir.

Q. How was the butcher pen used?

A. In what way?

Q. Well, how was the pen used?

A. Didn't have any pen, just had a gallows.

Q. Didn't have any fence?

A. No, sir, no fence around it.

Q. Just had a gallows?

A. Yes, sir.

Q. How was the stock confined there?

A. Oh, it was in a pasture—the stock was in a pasture.

Q. Do you know where the pond was?

A. The pond was on the north side of the butcher pen.

Q. Well now, what do you mean by offal? Do you mean the entrails of the animals?

A. Yes, sir.

Q. Anything else?

A. No, sir, nothing else.

Q. Wasn't there anything else? Nothing you had to take out?

A. I suppose——

Q. Excrement?

A. Yes, sir.

Q. What was done with that?

A. It was left there.

890 Q. Was there on any occasion any of the offal or excrement carried away?

A. I don't know of anybody taking it away.

Q. When it would rain where would the surface water go—where does the offal and the excrement that was left there, whereabouts would it go?

A. It would wash towards the swamp.

Q. What swamp, where the branch was?

A. Where they taken this water.

Q. Where the branch was that supplied the waterworks?

A. Yes, sir.

Cross-examination.

(By Mr. WIMBERLY:)

Q. What is your business now?
A. I am a butcher.
Q. Where do you butcher your cows now?
A. Over here at Mr. Bob Kennedy's.
Q. Where is that butcher pen?
A. It is over here on the Central railroad.
Q. That is a different direction entirely?
A. Yes, sir.
Q. As far as you know is this place of Mr. Adams', that you spoke of, used at this time as a butcher pen?
A. Yes, sir; he uses it, I think.
Q. You don't know, do you?
A. I have seen him butchering there this year.
Q. When is the last time you have seen him butchering there?
A. I seen him one time since Christmas.
Q. What time?
A. I don't recollect.
Q. The ditch from that pond leads out to the west away from the stream?
A. I don't know which way the ditch from that pond runs.
Q. You don't how how the pond drains?
A. No, sir.
Q. Were you out there during last year?
A. I have been there several times.
891 Q. What time year before last were you there four months—what part of the year?
A. From August until Christmas.
Q. You were the only one that butchered out there?
A. No, sir; he used it and I used it too.
Q. You and he together?
A. Yes, sir.
Q. Were you partners?
A. No, sir.
Q. You were not the only butcher in Dawson?
A. No, sir.
Q. There were other butchers that owned their places for killing?
A. Yes, sir.
Q. And didn't use this place at all?
A. No, sir.
Q. The cows that you killed out there they were grazed in the pasture?
A. No, sir; not raised in the pasture there.

The MASTER: I don't think he understood your question.
WITNESS: They were kept there some little time but not very long.

Q. Never had very many in the pasture at any one time?
A. No, sir.
Q. Some days you wouldn't kill any at all?
A. Yes, sir.
Q. And some days you would kill one?
A. Some days one, some days four or five—three or four.
Q. You kept the place clean didn't you?
A. No, sir.
Q. You had your hogs there?
A. I didn't have any hogs, Mr. Adams had hogs.
Q. This offal that you speak of, where was it placed?
A. It was left there.
Q. On the ground?
A. Yes, sir.
Q. The hogs had access to it?
A. Yes, sir.
Q. How far was it to Mr. Adams' dwelling house?
A. I suppose about two or three hundred yards.
Q. I understood you to say it was only two or three hundred yards to the pumping station, that would make it a good deal closer to Mr. Adams' house than to the pumping station?
A. I didn't say anything about the pumping station.
892 Q. How far was it from the pumping station to the butcher pen?
A. I suppose a quarter of a mile.
Q. Was it not a half a mile?
A. I don't think it was.
Q. It was a quarter of a mile from this stream or swamp?
A. No, sir.
Q. How far was it?
A. I suppose about two hundred yards.
Q. You never measured the distance?
A. No, sir; I never measured the distance.
Q. It was a good deal farther than it was to Mr. Adams' house wasn't it?
A. About half way, I should think.
Q. What do you mean by half way?
A. About middle way between the swamp and his house.
Q. If you were right just now in saying that it was two hundred yards from the swamp to Mr. Adams' house, it must have been four hundred yards from the pen to the swamp, or stream—You said that it was about two hundred yards to Mr. Adams' house, if it was two hundred yards from the pen to Mr. Adams' house, his house was about——
A. I don't understand you.
Q. If you say it was about twice as far to his house it was about half way?
A. It is about a couple of hundred yards from the gallows to the swamp and it is about that far from his house to the gallows.

Q. What direction was it from Mr. Adams' house to the gallows?
A. His house is north of the gallows.
Q. In the same direction as the swamp?
A. No, sir.
Q. Different direction?
A. Yes, sir.
Q. Wasn't his house south of the gallows?
A. No, sir.
Q. North?
A. Yes, sir.
Q. What direction is the swamp from the gallows?
A. South—well, it is southeast.
Q. There is no butcher pen there at all, just what you call a gallows—a tripod, something to hand a cow on?
893 A. That's it.
Q. Then some cows ran at large in the pasture?
A. Yes, sir.

A. J. BALDWIN, recalled for the respondents, testified as follows:

(By Mr. GUERRY:)

Q. How is the school here supplied with water?
A. In just our present condition with artesian well water.
Q. How has it been supplied during the last five or six years or seven or eight years?
A. Has not been in more than five years; been supplied by hauling water from the well down here.
Q. Why was that?

Objected to.

Mr. GUERRY: I propose to prove that the water was unfit and that he had to use other water.

Objection overruled.

Q. Why wasn't it used?
A. It was condemned as being unfit for use in the school.

Mr. WIMBERLY: I object to that. I don't think that is the way to prove contamination.

(By the MASTER:)

Q. By whom was it condemned?
A. Board of the school and the teachers at that time.
Q. By whom?
A. The school board and the teachers.
Q. Are you a member of that board?
A. Yes, sir.
Q. Did you take part in the condemnation?

A. I was at the meeting and acquiesced in it—the board acquiesced in it.

Q. Was it done by a formal written resolution?

A. I don't know whether it was done that way or not. *A.* I think it was on the recommendation of the superintendent and the
894 complaint of the people and teachers at that time.

The MASTER: I will admit this testimony.

(By Mr. GUERRY:)

Q. It was verbally condemned by concurrent action of this committee?

A. Yes, sir. Do you want to know the cause of it.

Cross-examination.

(By Mr. WIMBERLY:)

Q. Did they ever use the waterworks water in the school?

A. Yes, sir.

Q. How did they get it there?

(Mr. GUERRY:)

Q. What did they have to pay for the water per month?

A. Five dollars per month for carrying it.

(Mr. GUERRY:)

Q. For hauling it to the school?

A. Yes, sir.

Cross-examination resumed by Mr. WIMBERLY:

Q. Did they have connections in there?

A. Yes, sir.

Q. Water connection?

A. Yes, sir.

Q. When?

A. I don't recollect the dates, it was put in there. I think soon after the waterworks was put in. I don't recollect the length of time they have been using well water.

Q. They have kept it in there all the time?

A. I think perhaps until three or four years ago——

Q. Since this litigation?

A. Not since this one right now.

Q. Since the city has been in litigation with the water works company?

A. Yes, sir. I will state we had nothing to do with it——

Q. Not asking you for your reasons, I am asking you as to dates.

WITNESS: I am stating that as a fact.

The MASTER: That is inadmissible.

Q. That was after they built the artesian well—you mean this pumping station out here?

A. Yes, sir; this well was put there in '89, I believe, put there sometime before the present waterworks was put in.

895 The following letter was introduced in evidence by the respondents without objection:

PHILADELPHIA, PA., *Dec.* 17, 1894.

A. J. Baldwin, Esq., mayor of Dawson, Ga.

MY DEAR SIR: Your communication of the 14th at hand. We forward it this day to our att'ys Messrs. Hoyl & Parks of your city and respectfully refer you to them.

Yours truly,

(Signed) JNO. S. KEEN., JR,
Gen'l Manager of the Dawson Water Works Co.

Mr. GUERRY: We also offer in evidence certified tax returns of the company as already appears in the record.

The MASTER: The certified copy of the returns are admissible, I shall hold.

Mr. WIMBERLY: I understand your honor goes upon the idea that he has the tax returns. When they offer the papers I want an opportunity to be heard on that subject.

The MASTER: Very well.

W. F. LOCKE, sworn by the respondents, testified as follows:

(By Mr. GUERRY:)

Q. Where do you live?

A. I live in Dawson.

Q. Do you know anything about the water of the Dawson Water Works Company?

A. Yes, sir; been using it seven or eight years.

Q. What sort of water is it with reference to its fitness for use?

A. I used it possibly two weeks for drinking purposes.

Q. What year was that?

896 A. I could not be positive about it, two or three years ago. I got a boy later to bring us this water down here.

Q. What water are you talking about?

A. The pump water. I took to using the pump water.

Q. In the business part of the town?

A. Yes, sir. I bought a filterer and used this waterworks water for possibly ten days or two weeks and I quit using it on account of the filth that accumulated on the filter.

Q. Any other trouble that you noticed about it?

A. Yes, sir. At times the water is muddy and unfit for use. On one or two occasions the odor was so bad I would not use it for

bathing purposes, but had water brought from the well. That's when I lived up here.

Q. What year was that?

A. I think it has been about four years ago, but I could not be positive about the exact year.

Q. These other conditions, about the filth and muddy condition to what extent hast that prevailed—during what time?

A. Most every time we have a hard rain the water is muddy.

Cross-examination.

(By Mr. WIMBERLY:)

Q. The time you spoke of the odor how many years ago has that been?

A. About four years ago, possibly five.

Q. You say one or two, do you know whether it was one or two times?

A. I think possibly I had water brought from the well twice to bathe in.

Q. Now, you have used the water how many years?

A. I think I have used it since '94.

Q. Up to the present time?

A. Yes, sir.

Q. What you said about the odor is of course confined to the year you speak of?

A. I have not noticed any offensive odor about the water in the past year or two.

Q. The only time you speak of was on one or two occasions
897 some four or five years ago?

A. No, sir; I noticed it once or twice the first year I moved around where I am living now. I don't remember what year I bought that place.

Q. You noticed it once or twice?

A. Yes, sir.

(By the MASTER:)

Q. You say on one or two occasions you detected an offensive odor?

A. Yes, sir, more than that. Two occasions I think I refused to bathe in the water on account of the offensive odor and possibly four or five times, I noticed it.

Q. Was that when the water was very muddy?

A. No, sir; I don't think it was muddy.

Q. Was it when the water was low during dry weather?

A. I don't remember about that; could not be positive about that.

Re-direct-examination.

(By Mr. GUERRY:)

Q. At the time you noticed this odor, was the odor that of mud or was it another odor?

A. It was an offensive odor; I don't know what caused —, but I don't think it was from mud.

Q. Have you been using this water for drinking purposes except as stated?

A. Never used it for drinking purposes, except the two weeks that I spoke of.

WALTER CHRISTY, sworn for the respondents, testified as follows:

(By Mr. GUERRY:)

Q. Where do you live?

A. I live in Dawson.

Q. How long have you been living here?

A. About 12 years.

Q. Do you know the property of the waterworks co. in or near the city of Dawson?

A. Yes, sir.

Q. Do you know the surroundings and the creek and the
898 springs above there?

A. Well acquainted with them.

Q. How is it you are familiar with these premises?

A. I lived out there at my grandmother's. My grandmother lives about a mile and a half from town and I have been there often. Lived there with her a year.

Q. What year?

A. '90 or '91.

Q. Since then have you visited up there frequently—constantly?

A. Yes, sir.

Q. Do you know how the houses are situated on the west side of that branch, along the hill side on the west, up in that direction?

A. On the roadside?

Q. Yes?

A. Well, there are some houses all along up that road.

Q. What besides houses is there?

A. There is a butcher pen right up there.

Q. Right where?

A. About 150 yards from the stream up there.

Q. What stream, this branch that supplies the waterworks?

A. Yes, sir.

Q. Whose butcher pen is it?

A. Mr. Adams did the butchering there.

Q. When?

A. For 2 or 3 years.

Q. Back you mean?
A. Yes, sir.
Q. Do you know whether he is using it now or not—up to what time do you know he has been using it?
A. I understand he used it up to December.
Q. Of last year?
A. Ye-, sir.
Q. State how he used it?
A. He used it for butchering cattle. Been there and seen him butchering—good many times. I suppose 30 or 40 times I have seen him.
Q. What year did you see all that?
A. During the last two years.
899 Q. What was done with the offal—excrement of the cattle?
A. Left it on the ground there for the hogs, throwed it right out.
Q. Do you know whether the hogs always consumed this offal?
A. No, sir; I do not.
Q. Was the excrement thrown out the same way as the offal?
A. Yes, sir.
Q. In case it rained, where would the surface water go from where this offal was thrown—this butcher pen is located?
A. Go into this branch from where the pumping station gets their water. No other source for it to go.

Cross-examination.

(By Mr. WIMBERLY:)

Q. Do you know whether that butcher pen is being used now or not?
A. No, sir; I do not.
Q. Have you been there during January, February or March?
A. No, sir.
Q. You speak of the offal that you noticed there, you mean the offal for each day—how much offal did you ever notice?
A. Sometimes there would be more than at others.
Q. How many cattle would you see?
A. Sometimes two.
Q. That is as much as you have seen there?
A. Yes, sir; at any one time.
Q. The offal fresh or been there sometime?
A. Seen it fresh and some been there sometime.
Q. How far was that from Mr. Adams' house?
A. I suppose three hundred yards or more.
Q. How far from the creek?
A. About 100 yards.
Q. Did you ever measure it?
A. No, sir.

Q. You speak of its being carried off by rains, did you ever see it carried off or is that just an inference of yours?

A. No, I know it is on a hillside—slope and there is no
900 other way for the water to go except into that stream.

Q. That is what you base your idea on?

A. Yes, sir.

Q. It is comparatively level table-land at that place——

A. Sorter slants toward the creek—branch, no, sir; slants toward the branch.

Q. Where the cattle are butchered?

A. Yes, sir; sorter on a slope.

Q. Which direction does it slope?

A. Slopes east, towards the branch.

Q. Doesn't it slope towards north?

A. No, sir.

Q. What direction is that pond?

A. That pond, it is northwest from where they butcher. It is near the public road.

Q. Doesn't it slope toward the pond?

A. No, sir.

Q. Doesn't it drain into the pond?

A. No, sir.

Q. Sure about that?

A. Not where they butcher it is not.

Q. Where they butcher and leave the offal, doesn't it drain into that pond?

A. No, sir; it does not.

Q. How far is it from the pond to that place?

A. About 200 yards.

Q. You have noticed it close enough to know that it does not drain into the pond?

A. No, sir; that ditch goes from the pond around into the creek.

Q. Not asking you about that, I am asking you whether it drains into the pond?

A. No, sir.

Q. Is the pond between the butcher pen and the creek, or back in a different direction?

A. No, sir; back there.

Q. Another direction?

A. Yes, sir.

Q. Standing pond?

A. No, sir; it has a ditch but it is dry most of the time. The ditch runs right into the creek or branch.

901 C. DEUBLER, sworn by the respondents, testified as follows:

(By Mr. GUERRY:)

Q. How long have you lived in Dawson?

A. About 30 years. Since '73.

Q. What relation have you borne to the city council during that time, if any?

A. I can't tell you the years that I have been in council. Been in there off and on ever since I have been here.

Q. What relations to the fire company?

A. I have been chairman of the fire committee, engineer, etc.

Q. How long have you been engineer?

A. Ever since they got an engine, except one or two years I quit.

Q. What experience have you had in dealing with water through fire plugs and engines and through hose and nozzles for the purpose of extinguishing fires?

A. Well, I have been to every one—to every fire since I have been here.

Q. Covering what period of time have you been thus engaged and experience—about how many years?

A. I don't know. I think they bought that engine in '85, somewhere along there.

Q. Since then?

A. Yes, sir. Not positive about the year.

Q. During that period of time have you been familiar with the apparatus—the different kind of apparatus the city owned for fire purposes?

A. Yes, sir.

Q. What did the apparatus consist of during these years?

A. Well, the first was a chemical engine, 160 gallons—120 gallons, hose reel, steamer fire engine—two reels.

Q. Well that all: How much hose?

A. Well, we have had, I believe—you mean up to date?

Q. No, sir; what amount of hose did they generally keep on hand during those years?

A. Well, from 1000 to 1500 feet—from 600 to 1500.

902 Q. Feet?

A. Yes, sir. One reel carried 600 and the other one 400.

Q. Do you know the size of the different nozzles the city has owned during these years?

A. Yes, sir.

Q. What sizes?

A. Run from half an inch to an inch. One time we had an inch and an eighth, sent through mistake. I ordered out an inch nozzle.

Q. What became of that?

A. I got a $\frac{7}{8}$th nozzle in place of it, Callahan.

Q. What size nozzle did the city use during the years you speak of?

A. Inch and $\frac{7}{8}$ths.

Q. Sir?

A. Inch and ⅞ths of an inch nozzle, sometimes half an inch.

Q. You say an inch and ⅞ths?

A. No, I mean an inch nozzle and a ⅞ths of an inch and sometime half an inch nozzle.

Q. Are you a practical engineer?

A. No, only they sent an engineer from New York here to instruct me. All the information I have got I got from him and practice during the time.

Q. You have been a practical engineer with reference to the use of water for the extinguishment of fires?

A. As far as fires are concerned.

Q. With the same amount of pressure, what nozzle throws the water fartherest, one inch, half inch or one smaller size?

A. Well, I would use a ⅞ths.

Q. Smaller size with the same pressure throws the water farther, doesn't it?

Objected to as leading.

WITNESS: I don't claim to be an expert.

The MASTER: Your question is leading.

Mr. GUERRY: I know it is.

903 Mr. GUERRY:

Q. Which throws the water further, a small nozzle or a large one, other things being equal?

A. If you can get the pressure, you mean?

Q. The other things being equal, which throws the water the furtherest?

A. Small nozzle will throw the water the furtherest.

Q. During these years have you attended any fires in the city of Dawson?

A. Every one of them.

Q. Did you attend the Green and Whitehard fires?

A. Yes sir. I was not a member of the company.

Q. I am not asking you about any membership: Did you attend the dry kiln fire?

A. The dry kiln?

Q. The dry kiln fire, I mean?

A. Yes, sir; I was there.

Q. The Farnum House fire?

A. Yes, sir.

Q. The oil mill fire?

A. Yes, sir.

Q. The McClellan fire?

A. Yes, sir.

Q. The Parks fire?

A. Yes, sir.

Q. The Bob Smith fire?
A. No, sir; I didn't attend the Bob Smith fire.
Q. The Variety Works fire?
A. Yes, sir.
Q. Well, on those various occasions what size nozzles were used in the efforts to put out the fire?
A. Well, from ⅞ths to an inch.
Q. Which did you generally use?
A. We had a ⅞ths on one reel and an inch on the other.
Q. What length of hose, according to your recollection and judgment, was used on those different occasions—go ahead and specify as well as you can?
A. I could not tell.
Q. Could you give the court the range, to what extent it ran, how high and how low: Do you remember the McClellan fire?
A. Yes, sir. The pressure was very poor from the plug.
Q. I am asking you about the length of hose now: What
904 was the length of hose the city had during these years—sections?
A. Well, they ran from 30 to 50 feet.
Q. Do you remember the McClellan fire?
A. Yes, sir.
Q. Do you remember the length of hose used on that occasion?
A. No, sir; I could not say.
Q. Was it long or short, do you remember that?
A. Short. I don't suppose it was over 100 feet or so——

Mr. WIMBERLY: He says he does not remember.
Mr. GUERRY: I don't insist on that answer.
The MASTER: That part of the answer goes out, of course.

Q. What about the pressure on that occasion?
A. Very poor.
Q. What amount of pressure was there—you saw it throw water, did you?
A. Yes, sir.
Q. What amount of pressure was there—how high could the water be thrown?
A. I expect about 20 or 25 feet. Could not get near the fire there. For awhile they used some boards something or other—got in front of it.
Q. Was the air still or otherwise?
A. Well——
Q. Anything unusual?
A. It was still. Burned up more houses if it had not been.
Q. At the variety works, do you remember how much was used on that occasion?
A. We used the engine there.
Q. Sir?
A. We ran the engine there.

Q. Was there any hose used from the waterworks that you remember on that occasion?

A. Any hose?

Q. In connection with the hydrant of the company?

A. We taken the suction from the cistern.

Q. Did you use the waterworks company's water on that occasion?

A. Used it out of the cistern. I don't know. I think they had hose run from the plug into the cistern.

Q. Do you remember the length of that hose?

A. I suppose about 600 feet.

905 Q. Now at the Farnum House fire, do you remember the length of hose used on the plug at the Farnum House fire?

A. Which fire?

Q. When the Farnum house burned?

A. Burned up several times.

Q. Been burned up, the same house, several times?

A. Think they had the third fire.

Q. The one in '98, you remember that I suppose; do you remember that fire in '98?

A. Yes, sir.

Q. How much hose was used from the waterworks on that occasion?

A. I don't know. I was with the engine and I didn't pay much attention to it.

Q. I will get you to state what the difference would be, where the pressure, all the other conditions being the same, what the difference in the distance that the water would be thrown in using 100 feet of hose and two hundred feet of hose?

A. Wouldn't be a great deal, very little.

Q. Suppose 300 feet were used instead of 100, what would be the per centage of difference—how considerable?

A. Very little.

Mr. WIMBERLY: I object to this. He is not an expert and has paid very little attention to it. Would like for him to explain himself on that.

Objection overruled.

WITNESS: I would like to explain myself on the ⅞ths nozzle: It will throw water further out of a ⅞ths than it will a ¾th inch—than it will an inch. That's what I was trying to do.

Q. The smaller the nozzle, other things being equal, it will throw the stream further?

A. Yes, sir; if you have the pressure you can throw the water.

906 Q. Mr. Deubler, if the pressure and all the conditions are such that water will be thrown through 100 feet of hose with a one inch nozzle 50 feet vertically in still air, how high will the water be thrown through 100 feet or 200 feet of hose, vertically in

still air, all the conditions being the same, except the difference in the length of hose?

Mr. WIMBERLY: I object to this. In the first place he has not shown himself to be an expert; and in the second place, it is irrelevant and incompetent * * *

The MASTER: I have ruled that I would exclude testimony directed to show the pressure existing, unless facts can be shown which constitute substantially the same conditions as are required for the test. This witness, while he may not be an accomplished expert, I think he has had sufficient practical experience to entitle his evidence on that line to be received. I understand the question of counsel is, what would be the difference in the height the water would be thrown under the same conditions?

Mr. GUERRY: Exactly.

The MASTER: Exactly the same conditions, except as to the length of the hose? I will admit that testimony.

(The question was then read to the witness by the stenographer.)

A. Well, the further off you get, of course there is more friction—loss.

Q. How much would be the difference—about how much would be the difference?

A. I could not tell that exactly.

Q. I know you can't exactly, but to the best of your judgment?

The MASTER: As an expert, won't he have to give an exact estimate?

Mr. GUERRY: No, sir; he can give his opinion and estimate the difference.

907 The MASTER: Answer the question.

Q. About what would the difference be?

A. Be safe to say it would be between ten feet.

Q. Sir?

A. Ten feet difference. Would not be that much, not in 300 feet, no, sir.

Q. How many hundred did you say?

A. 300 feet.

Q. Two hundred instead of one?

A. I don't think there would be a foot's difference in 200.

Q. In 300 you have already answered that correctly, have you?

A. Yes, sir.

Q. Now 400?

A. Well, the further off you get the more friction-loss.

Q. What would be the difference in 400 feet?

A. I could not answer that question positively.

Q. Now Mr. Deubler, I have called your attention to certain fires when you were present, the McClellan fire, the Parks fire, the Green and Whitehard fire and the dry-kiln fire; I will get you to state from your observation of the way the water was thrown and handled—

manipulated on those occasions whether there was at that time sufficient pressure from the waterworks company to have thrown water through 100 feet of hose, one inch nozzle, in still air, vertically 50 feet?

Objected to as incompetent, irrelevant and inadmissible; and an expert cannot give an hypothetical opinion, unless it appears first that he knows all the facts—seen all the facts upon which he bases that opinion.

The MASTER: While this witness, I don't think he professes to be an expert, if I might say, he has had sufficient practical experience, whatever may be the weight of his evidence, I think he has had sufficient practical knowledge of the subject to entitle it to admission.

Now an expert giving his opinion is not required to state the
908 facts on which he bases that opinion. He can answer a hypothetical question and give his opinion without stating the facts.

I understand this question relates to fires at which this witness was present. If he states that he knows the conditions, then I think he can give his opinion.

(The question was then read to the witness by the stenographer.)

A. No sir; there was not pressure enough.

Q. How far short was it, in your judgment?

A. I don't know. I could not say exactly.

Q. To what extent was it short, considerable or inconsiderable?

A. Considerably short.

Q. Do you remember that old tower?

A. Very well, sir.

Q. How far did you live from it?

A. I don't suppose I lived over 75 or 100 yards—feet—right across the street.

Q. What was its condition?

A. When?

Q. Say in '95, '96, '97, and '98, until it was replaced with another one.

A. It was in a leaky condition.

Q. Give the master to what extent it leaked, the best you can?

A. Well, after filling it about half full, further up it leaked. Like filling a basket.

Q. Up to what extent, half way?

A. Yes, sir; about half way. I suppose it leaked all around. Shot out big streams in some places as big as my hand.

Q. The stream was?

A. Yes, sir.

Q. That one stream running off or a number of streams?

A. Had large ones and small ones all around the staves running up and down.

Q. Where the standpipe went in how about that point, any leak there?

A. Run all around. I didn't get under there and see.

909 Q. Did it interfere with people going around or near it on account of leaking?

A. At times when they would fill it, generally take a long time, after it passed half way, have to go on the other side of the street, you know. On account of the wetness of the earth and the spray. Water run down it, I suppose, 85 feet, and fall over and shoot out may be a foot or so from the sides.

Q. Would it reach the sidewalk?

A. Yes, sir. If the wind was blowing it would reach over in my porch.

Q. 100 feet away at that time?

A. 40 foot street there and I live about 20 feet from the street.

Q. Are you talking about occasions when this tank would overflow from the top or sides from leakage?

A. They had a top on it and it couldn't overflow. They had a pipe to take off the surplus water there.

Q. After it got up to that pipe it would be conducted away?

A. Yes, sir. You could tell how high they filled it by the leaks. They would pump and pump until that thing was swelled up and then it would gradually go down. Don't think that tank had been filled for several years. Could not be.

Q. What were the indications as to the security of that tower?

A. Well, the people around there were a little uneasy about it.

Objected to as irrelevant and inadmissible; and objection sustained.

(Objection was then withdrawn.)

Q. What about that?

A. As to leaning?

Q. Yes?

A. I didn't notice it leaning much.

Q. What was the quality or condition of the hose during these years that — was owned by the city?

A. Well, they were about in as good shape as any fire department, I suppose.

910 Q. These fires that you attended, were they in good condition, if not, on what occasions were they not?

A. All that I saw there were some little leaks; but it would not affect the pressure such leaks as they were.

Q. Was there more than the usual amount—is it customary to have some degree of leakage?

A. Where it is used on an engine or plug, it weakens that part, the leaks.

Q. The leaks you speak of, were they ordinary leakage?

Objected to as leading.

Q. State whether the hose that was used on these occasions was in good condition or not?

A. Well, most of it was.
Q. Now what occasion was it where it appeared otherwise?
A. I could not say.
Q. To what extent did this leakage exist where there was any?
A. Not a great deal.
Q. Was it any material extent or not?
A. No, sir.

(By the MASTER:)

Q. What was the height of the water tower?
A. It was 60 feet. There was 25 feet of tank on top.
Q. Sixty feet from the bottom of the tank?
A. Yes, sir; 60 feet.
Q. What was the capacity of the tank?
A. I don't know whether it was 75,000 gallons—I don't remember the capacity.
Q. If the capacity was 40,000 gallons and the height of the tank from the bottom was 60 feet, how high would that raise a stream of water, vertically, in still air, through an 100 feet of hose with a one inch nozzle?
A. 100 feet high.
Q. No, if the tank was 60 feet high from the bottom, with a capacity of 40,000 gallons?
A. I don't know, I am not prepared to say.
Q. Don't know how high that would raise a stream vertically?
A. No, sir. I was at the test when it was full—about full——
911 Q. I am asking you as a question of hydraulics?
A. I could not answer that.

Cross-examination.

(By Mr. WIMBERLY:)

Q. You have been at how many fires?

The MASTER: You may examine this witness as to his expert knowledge.

Q. Have you ever studied anything about the science of fire pressures, that sort of things?
A. No, sir; only from experience with fire engines.
Q. Experience with the fire engine here?
A. Yes, sir.
Q. Forced pressure with a fire engine?
A. Yes, sir.
Q. Did you ever watch any hose stream under natural pressure of headwater without the aid of an engine?
A. Hose stream?
Q. Yes?
A. Yes, sir.

Q. Just as any citizen would do, didn't you: Have you ever handled the hose yourself?
A. Yes, sir.
Q. You usually go with the engine when you go at all?
A. No, I take hold anywhere I can get to it, if I can.
Q. Have you ever used hose anywhere else except Dawson?
A. Yes, sir; in Nashville, Tenn.
Q. Member of a company there?
A. Yes, sir; light reel. That is the first company I ever was with.
Q. What was it?
A. Run with a light reel at Nashville.
Q. What was your position?
A. Going to fires.
Q. What part was your position in the company?
A. Didn't have any particular part.
Q. Was it a volunteer company?
A. Yes, sir.
Q. How long ago was that?
A. It has been 30 years ago.
Q. How long were you there with them?
A. I could not remember, not long. I was quite young.
912 Q. About how long?
A. '79: I suppose in that company a year or so.
Q. You say you were quite young, were you grown?
A. No, sir. I think I was about 17 years old when I belonged to that company.
Q. Volunteer company?
A. Yes, sir.
Q. Do you know how many fires you attended?
A. No, sir; never kept any record of the fires. When they had a fire I would go to it. They had some three or four in a night and then sometimes it would be three or four days before they would have one.
Q. The company you were with in Nashville: Did you go to any more fires until you came to Dawson?
A. Yes, sir; I went to fires in Kentucky but not as a fireman.
Q. Did they have a fire department where you lived in Kentucky?
A. No, sir.
Q. Have waterworks?
A. No, sir; had a bucket brigade.
Q. The next time then where you fought fires, where they had waterworks, was in Dawson, Ga., was it not?
A. Yes, sir; where I fought any fires.
Q. Where you noticed them fought?
A. No, I have been in Atlanta and different places.
Q. Just on the outside?
A. No, sir; used to live there.
Q. Were you a member of any company there?

A. No, sir.
Q. Pay any special attention to fires?
A. Always did.
Q. Always paid special attention to them?
A. Yes, sir; if there was a fire I was there.
Q. You have lived in Dawson how long?
A. Since '73.
Q. You joined the fire company here when?
A. I was one of the first members of the chemical engine.
Q. When did they discontinue the use of the chemical engine?
A. I don't remember. A little after the waterworks started
913 here.
Q. About the time the waterworks was established?
A. Sometime afterwards. You see the whites had the waterworks and give the negroes the chemical engine.
Q. Do you remember in '91, I believe, when the waterworks were completed: From that time up to the present time you usually attended fires?
A. Yes, sir; I never miss a fire if I am here or know anything about it at all.
Q. In '95 and '96, what connection did you have with the fire department?
A. I don't know. I quit the fire company along—I don't know what year—but I would always go to fires whether I belonged or not.
Q. Before and after you quit the department?
A. Yes, sir.
Q. You took part in fires after you quit?
A. Yes, sir.
Q. During '95 and '96 did you have anything to do with the fire department?
A. I don't know, I may have. I can't give you the years. I don't remember the years I quit the department. I think a short time, a year or so. We didn't have much of a department it went down to nothing.
Q. They let the hose go down, in bad condition, didn't they?
A. No, nothing extra bad.
Q. Do you know whether they did add new hose during that time, when they claimed not to have much of a fire department and you quit?
A. No, don't remember buying any. They may have bought though.
Q. You condemned a good deal then from time to time?
A. They would cut it off and slip the coupling up, which would make it as good as new.
Q. When did they do that cutting off?
A. All along. Do it now, whenever one needs it.
Q. All these sections are originally 50 feet sections before you cut them off?

A. Yes, sir.

914 Q. When you have any 30 feet sections, it is a section that has been cut off—one end of it has been cut off?

A. The other part is as good as new.

Q. That is a fact?

A. Yes, where it leaks a little.

Q. Why would you cut it off?

A. So the hose wouldn't leak.

Q. When would you discover that it was leaking and cut it off?

A. When?

Q. At the fire?

A. At the fire or any time.

Q. Did you have anybody here to test the hose at times when you didn't have any fires to see whether they were in good condition or discover it at fires?

A. We sometime, perhaps, used the hose.

Q. During '95 did you ever practice with the water?

A. No, sir.

Q. In '96 did you ever practice?

A. I think I repaired a lot of hose along in that time.

Q. In '96 you practiced?

A. I don't remember.

Q. Do you remember practicing in '97?

A. No, sir.

Q. Or '98?

A. No. But we would have the hose out sometime—we would wash a sewer something of the kind.

Q. Where would you get the water to wash the sewer?

A. Get it from the fire plug and sometimes use the engine.

Q. Who would get it?

A. I don't know. I reckon I was chief boss at the time.

Q. As a member of the fire department?

A. I went and got it.

Q. I believe you say you were member of council all during that time?

A. No, sir; not all during that time. At different times.

Q. When you would clean the sewers and like, you were member of council?

A. I don't remember whether I was or not. Sometimes I was and sometimes I was not.

Q. Why did you clean the sewers, as a private citizen?

915 A. No, sir; sometimes one would get choked up and I would ask Mr. Horsley about it—little short place—sometimes it wouldn't be a large sewer.

Q. Is it a fact or not that the city here has any regular system of inspecting these hose?

A. Yes, sir.

Q. Prior to the institution of the present paid department?

A. You mean general inspection?

Q. Yes?

A. I generally done all the inspection that was done at that time.

Q. Isn't it a fact that there was no inspection generally—no regular inspection generally and the only way you would find that hose was bad was when you were trying to use it at fires and then you condemned it?

A. We would find it out that way sometimes.

Q. Did you have any apparatus to test it to see whether it was strong at that time?

A. Didn't go right into a test to test the hose.

Q. I said did you have any hose testing apparatus?

A. No, sir; didn't use any.

Q. You didn't have any pumping machine—didn't have any hose testing machine to test the hose by pumping into it?

A. Didn't think it was necessary. Our hose is guaranteed 400 pounds to the inch and the waterworks is 55 pounds. No danger in the world of bursting.

Q. Haven't you seen it burst?

A. No, sir; I have seen leaks. Never saw what you would call bursted hose.

Q. You didn't test it to see whether it leaked or not—had no system of testing it except at fires?

A. No, sir.

Q. Frequently at fires hose would develope leaks and afterwards condemned?

A. May be a long time afterwards. Sometimes it would be six months or longer.

Q. Wasn't hose condemned at the Green and Whitchard
916 fire—4 or 5 sections of it?

A. I don't know who could have condemned it.

Q. Don't you know that Mr. R. A. Bishop did condemn it at that fire?

A. No, sir. I was not a member of the fire department at that fire.

Q. Did you attend the fire?

A. Yes, sir.

Q. Did you keep up with the fire to know whether hose was or was not condemned at that fire?

A. Never heard of it being condemned.

Q. Where were you at that fire—what were you doing?

A. I was on top of the house trying to get the stream on the roof. I climbed up.

Q. How many lines of hose were there at that fire?

A. I didn't see but two I think.

Q. Were there not three?

A. I didn't see them.

Q. What plugs were those streams attached to?

A. I suppose at the Littleton plug—Melton plug. I didn't go to the plug. I went up towards the nozzle and tried to save the house.

Q. Do you know how long those lines of hose were?

A. No.

Q. There were two lines on the same plug?

A. I told you I didn't go about the plug.

Q. You did know that the nearest plug was 450 feet to that fire?

A. I didn't know the distance.

Q. Do you know the size of the main at that point, whether four or six?

A. Four inch I think.

Q. It is the smallest main?

A. Yes, sir.

Q. The plug is now where it was then—never has been moved, has it?

A. No, sir.

Q. Are you enough expert in the matter of using fire streams to know how many streams you could, with reference to the size of that main—do you know how many streams you can put on
917 the same main?

A. I know if you had the pressure behind it what it would do.

Q. I am speaking about the size of the main, do you know how many streams a main of that size will stand?

A. The smaller the main the less the streams.

Q. The more streams you would use the shorter the lines you would use for smaller mains?

A. Yes, sir; but you can't regulate the lines at fires. You have got to get to the fire.

Q. You don't regulate the lines, you go by the fire?

A. If you have got a plug and you want to reach the fire, you use one line of hose.

Q. At any one of these fires you speak of, do you know how much hose was used at any one of them?

A. Never kept any count of them at all.

Q. You made it your business to know?

A. No, sir.

Q. About how many lines were used?

A. No, sir; I didn't make it my business to know.

Q. As a matter of fact, you are not able to say, are you, how many lines were used at these different fires?

A. Some of them I could say.

Q. Which ones can you say as to the number of lines of hose used?

A. This Variety Works fire. I used the engine there.

Q. Where did you get the water?

A. Got it out of the cistern.

Q. I believe you said that it was turned into the cistern from one of the fire plugs?

A. Hose run in there to keep it from exhausting.

Q. Hose was run in there from one of the fire plugs, wasn't it?
A. Yes, sir.
Q. So as the engine took it out the hose would put it in?
A. No, the engine brought it out of the cistern.
Q. The hose from the fire plug would put it in the same
918 cistern?
A. As the water got low the plug put it in.
Q. Mr. Deubler, that is the only occasion, after January 1st, 1895, in which the engine ever was used in taking water out of a cistern, as far as you know?
A. No, *i*sed it at this Farnum House fire.
Q. Well, at the Farnum House fire there was another line of hose run from a plug into the cistern, wasn't there, so as to put the water into the cistern from the fire plug as the engine used it out?
A. Yes, sir.
Q. Another time the engine used the cistern after Jan'y 1st, 1895?
A. I don't remember.
Q. These are the only two that you remember; I believe you say your business was with the engine usually?
A. Yes, sir.
Q. When hose is old, outside leaks, doesn't the toughness of the lining of the hose affect the strength of the stream?
A. If the lining is loose it would more or less.
Q. It does get loose in old hose, does it not?
A. Yes, sir; sometimes.
Q. And cracked?
A. Yes, sir.
Q. Where it is rough and cracked, in old hose, that affects the stream, does it not—the force of the stream?
A. To some extent, yes, sir.
Q. At the Variety Works fire there was another line of hose besides that one you spoke of just now?
A. May have been, I don't remember.
Q. Don't remember how many lines were used?
A. No, sir. You could not use but one line to throw the water.
Q. What say?
A. I say they could not throw the water the distance we had there.
Q. You would have to use more than one, is that right?
A. No, used one line of hose, I remember, to the engine. That's the only one that done any work there.
919 Q. Didn't the fire department get a line of hose and attach it to a plug and play a stream on the fire at the Variety works?
A. May have tried it before I got there.
Q. You don't know about that. It was a long ways from the nearest plug, the Variety Works fire?

A. The plug is at the gate of the Variety works. Some distance from the fire.

Q. The plug was some distance from the fire?

A. Yes, sir.

Q. The fire was in the back part of the grounds—large grounds there?

A. To one side—to the right of the main building.

Q. From the fire to the nearest plug, at the Variety works, was 600 feet, wasn't it?

A. I expect it was, yes.

Q. You spoke of force, you say you know about the loss of pressure in hose lines over 300 feet, do you remember any fire at which there was not some hose line used as much as 400 feet or over?

A. Yes, sir; over here at the bakery fire.

Q. The bakery fire was in '95?

A. I don't know what year it was in.

Q. That was to put out the bakery?

A. Yes, sir; small fire.

Q. Any trouble with the pressure at that fire?

A. Didn't get much.

Q. The bakery fire was put out all right: Take these others you speak of, can you designate a single one that there was not, where you spoke about the pressure—where the line of hose was not over 300 feet?

A. I told you I could not give you the exact number of feet.

Q. As a matter of fact you paid very little attention to the length of hose and lines of hose and the condition of the hose at these different fires?

A. The condition of the hose, as long as I was a member, I paid close attention to that.

Q. You were not a member in '96?

920 A. It was '95 or '96 I was out awhile.

Q. You spoke about the number of feet of hose in '95, how many feet of hose did the city have?

A. I think from 1200 to 1500.

Q. Didn't they have 1800 feet?

A. I don't remember exactly.

Q. How much did they have the next year, 1896, they increased it a little, didn't they?

A. I don't remember.

Q. How about '97?

A. If you can tell me when these fires were I can tell you.

Q. Which fire?

A. The Farnum House fire.

Q. That was in '98—April '98?

A. We bought a 1000 feet of hose that year.

Q. In '97, how much did you have?

A. Had the same amount, I suppose, that we had before that.

Q. You re-organized the department in 1898, isn't that true?

A. Yes, sir.

Q. Since that time you have had comparatively a good supply of hose, after you reorganized it?

A. We have got—probably had the same hose we had then, only we have added on to the length of it. We have ordered more hose.

Q. Take '95, at that time the hose was beginning to get pooor—old, most of it?

A. Some of it was.

Q. In '96 it was getting still older, wasn't it?

A. Of course, it gets older every year.

Q. '97 older still: During '96 and '97 they bought very little hose, didn't they?

A. I didn't pay any attention to what was going on.

Q. Isn't it a fact that it was during those years, '96 and '97, that they had most of these fires?

A. I can't tell you a thing in the world about the fires. I know they had fires, which is all I can tell you.

Q. You don't know that it was during '96 and '97 when
921 the hose got old, the quality was run down, that you had nearly all the fires that you have had in the city?

A. I don't remember about that. I can't come at the years.

Q. Take this McClellan fire, that is some three-quarters of a mile from the nearest engine house or place for keeping the hose, wasn't it?

A. Three-quarters of a mile, I think probably.

Q. So the department that fought that fire had to get up about three o'clock in the morning—wasn't it about 2 or 3 o'clock in the morning—in the early morning?

A. No, I think about 12 o'clock, somewhere along in there.

Q. Wasn't it later than 12—after the people had gone to bed?

A. Yes, sir.

Q. Isn't it a fact, that night they had to get up, after the alarm and come some distance from the residence portion of town, down to the nearest engine house where the hose was, and then carry the hose up three-quarters of a mile by hand before they could commence playing on the fire?

A. You don't understand. When they had a negro company, they rove most all the time—all times of the night: and there is no trouble to get a negro squad there at any time.

Q. Don't you know as a fact in reference to that particular fire, that they were on that particular occasion very late in getting to the house with the hose and the house was nearly burned up before they commenced playing on it?

A. I think it had nearly burned up before they discovered the fire at all—before the occupants of the house did.

Q. When you got out there it was an extremely hot fire and you could not get any ways close to it—unusually hot?

A. Yes, sir; about as hot as generally.

922 Q. Isn't it a fact, that instead of attaching two lines of hose to the nearest hydrant—do you know how many lines of hose were attached to the hydrants?

A. Yes; there was one at the upper end and one right across the street there.

Q. Then there was still another one—wasn't there three lines?

A. I don't remember about three. I think they run their hose out and moved it up to the other plug, something of that kind.

Q. Do you remember what plug they removed it from?

A. About Col. Parks'.

Q. They moved it up to what plug?

A. Took the hose to the Littleton plug, near by Griggs'.

Q. Wherever they moved it to they moved it from Col. Parks'?

A. Yes, sir; up here. I don't say they moved it.

Q. Which one of the hose lines attached to the plug did you look after?

A. I looked after the one run from Griggs'.

Q. That is about 400 feet, isn't it?

A. I don't know—no, I should not think it was.

Q. Did you ever measure it?

A. No, sir; but I should not think it was that long.

Q. That was the stream you had charge of; and you paid no attention——

A. I didn't have charge of it particularly. I was always around the different streams.

Q. Did you have charge of any stream?

A. I remember going from one to the other trying to put out the fire.

Q. The one you were working with was the north stream?

A. Worked with that some and went around to the other one.

Q. What sort of a nozzle did you have?

A. Nozzle, throws about half inch stream. May be a little larger. You can reduce it down to a fine spray by turning it.

Q. Had a ball in it?

A. No, sir.

Q. That was the one that led from Griggs'?

A. Didn't have any particular one. Had one spray nozzle and some others.

923 Q. You spoke just now of the different size nozzles. I understood you to say that a ⅝ths inch nozzle throws a stronger stream than a one inch?

A. It will throw a stream higher from this waterworks because you have no pressure behind it to throw it.

Q. How about half inch nozzle?

A. I expect you could get more force out of a half inch with the pressure that we have had here.

Q. You know that?

A. Yes, sir; I do know it.

Q. You say a half inch nozzle will throw a stream higher than a one inch nozzle?

A. No, sir.

Q. You say a ⅞ths nozzle will throw a st-eam higher than a one inch nozzle?

A. I don't say it will do it if you have got the pressure behind it. I am speaking from experience with this waterworks.

Q. You are limiting it to this waterworks?

A. Yes, sir. You have not got the pressure to throw this stream like you ought.

Q. You were a member of council in '91, were you not?

A. Yes, sir.

Q. In '92?

A. The time I say I don't remember.

Q. You were also a member of council in '86, were you not?

A. When they made this contract?

Q. Yes?

A. Yes, sir.

Q. When the election was had?

A. I don't think I was a member when the election was had. No, I was not. Baldwin was mayor.

Q. '86 election?

A. I was a member after that. I was a member when the contract was made.

Q. I will get you to look at that affidavit that you made in one of the cases at one time to refresh your recollection?

A. I was a member when the contract was made.

Q. It is a fact that you entered into that contract by
924 reason of the expressed wishes of the people in that election?

A. We taken that election as a guide for that contract.

Q. It is a fact that at that time the mayor and council acted in carrying out the wishes of the people here in making that contract?

A. We thought so.

Q. It is a fact that prior to entering into the contract the mayor and council discussed the matter very fully and very freely and endeavored to learn if there was any objection to it, and practically the whole town, with one or two—not over three objections, were in favor of it?

A. We didn't hear any objections. I did not.

Q. They were really clamoring for it at that time?

A. What do you mean by clamoring?

Q. Very anxious for it?

A. Wasn't any objections to it. I don't know whether they were clamoring for it.

Q. You were present when that test was made?

A. Yes, sir.

Q. The waterworks threw the water all right at that test?

A. Thought so.

Q. Everybody was perfectly satisfied at the time, were they not?

A. Thought they come up to their fifty feet.
Q. What say?
A. Thought they throwed water 50 feet.
Q. It throwed it at that time considerably more than 50 feet?
A. We didn't measure it. We went by Baldwin's building. Went a little over it.
Q. The building, you knew the height of it?
A. We supposed it was 50 feet. Didn't measure it at all.
Q. There were three streams thrown at one time?
A. Three?
Q. At the time of that test?
A. All hydrants have two plugs to it.
Q. During the test there were three streams thrown at the same time?
A. I don't remember.
925 Q. Isn't it a fact that the stream was thrown 70 feet high?
A. 70 feet?
Q. Yes, at the time of the test I speak of?
A. I don't know nothing about 70 feet.
Q. You don't know about that?
A. No, sir. They throwed it up on that building, which was supposed to be 50 feet.
Q. Wasn't it by actual measurement 62 feet?
A. The building?
Q. Wasn't that building 62 feet high?
A. Not that I know of.
Q. Wasn't that the height of it: you say it went above that building?
A. Went above the building.
Q. Three story building?
A. Baldwin's building at the corner.
Q. The same one that is here now?
A. Yes, sir.
Q. That three story Baldwin building?
A. Yes, sir.
Q. Same height then as it is now?
A. Yes, sir; if it has not settled any.

Re-direct examination.

(By Mr. GUERRY:)

Q. At the time of this election in '86 had this Bennett & Co. contract ever been heard of?
A. No, sir.
Q. Now take the bakery fire, how high was the water thrown on that occasion?
A. Well, you know about the height of a little one story building.
Q. About how high?

A. I could not tell. Don't suppose it was necessary to throw it over 25 feet high—20 somewhere along there.

Q. The test that was made that Mr. Wimberly asked you about, was from an eight inch main, wasn't it?

A. Yes, sir.

Q. Mr. Deubler, from your knowledge of these sort of fires, and observations and experience, your presence at the McClellan fire that you have spoken of, I will get you to state whether the pressure at that time was sufficient to throw this water vertically, in
926 still air, 50 feet, through 100 feet of hose, one inch nozzle at that time when they were using it?

Objected to.

The MASTER: I think that question was asked in almost that exact language.

Q. What is the distance of these plugs from each other down in the business part of the town?

A. I don't suppose they will average 300 or 320 feet apart.

Q. Out further what is the distance, in the residence portion of the town?

A. I could not tell you exactly.

Q. You don't remember?

A. No, sir. The water plugs, some of them are 300 feet; and sometimes a plug is on the opposite side of the street, which would be the width of that street.

Q. I am talking about out of the business part of the town, further or closer?

A. They are further.

Re-cross-examination.

(By Mr. WIMBERLY:)

Q. Mr. Guerry asked you if that test wasn't from an eight inch main, don't you know they made a test at a four inch main at the time the city accepted it?

A. I was at the one they made the test at the tower.

Q. Wasn't you at the one they made out in front of your house?

A. That is the tower.

Q. Don't you know that is a four inch pipe?

A. I think they run an eight inch pipe into that tower.

Q. At that tower, don't you know it is a four inch main?

A. I don't know about that.

Q. Were you not at some other tests besides that?

A. I don't remember any other test.

927 L. C. GONEKE, sworn by the respondents, testified as follows:

(By Mr. GUERRY:)

Q. What is your profession?
A. Practicing medicine.
Q. How long have you been practicing?
A. About 18 years.
Q. How long have you been living in Dawson?
A. 12 years.
Q. What experience have you had with the Dawson Waterworks Co.?
A. Been using it until the last two months ever since it was put in town.
Q. What use did you put it to?
A. Drank it for a short while and I used it after that for irrigating my garden, yard, bath-tub, kitchen, watering stock, etc.
Q. What was your experience with it as drinking water?
A. I could not use it. Caused indigestion. Me and my wife both quit using it on that account.
Q. Did you make any discoveries about it with reference to drinking it?
A. None whatever except we both quit using it on that account.
Q. Did you use it for bathing purposes?
A. Yes, sir.
Q. How long did you drink it?
A. Two or three months before I quit it.
Q. Did you use it for bathing purposes?
A. Yes, sir.
Q. For how long?
A. I don't know how long the waterworks has been in vogue, nearly ever since they have been in town.
Q. What has been your experience with it for that purpose?
A. At times it could not be used at all.
Q. Why?
A. Entirely too muddy and had an offensive odor about it at times.
Q. State whether or not that was a rare case—to what extent was it the case?
A. Could not tell you exactly. Quite a number of times during my experience with it, after rains. I attributed it to the effect of rain in the water.

Q. What was this odor?

928 A. I could not tell you. Peculiar offensive odor, when I turned it on in the bath-tub. I didn't use *it* at all.

Q How frequently did you do that?
A. Impossible to say. Quite a number of times during my ex-

perience. About as definite as I can be, I suppose, 6 or 8 times in one month and once in 2 or 3 months. Could not say definitely.

Q. That was the case generally during wet weather, you mean to say?

A. I attributed it to the rains, yes.

Q. In dry weather how about the water?

A. The water was clear and very good for stock uses, and bathing purposes. Could not use as much as I needed for irrigating purposes.

Q. Why?

A. At that time I was notified to hold up on it.

Q. By who?

A. By Mr. Horsley, the superintendent.

Q. Was that at time when you appeared to need—when you particularly needed irrigating?

A. Yes, sir. I had a spigot for irrigating my yard and street in front and also my garden. The times I needed it most during the summer. Had to hold up and didn't use it. Paid for it during the winter when I had no use for it.

Q. I will ask you to state as a physician, if the use of this water—having used this water and having had the experience with it, whether it was wholesome water or not?

A. I considered it very unwholesome.

Q. Not as a physician, from your experience with it as a practical man, and from the facts you have mentioned, state whether it was fit or *unfit* for bathing purposes and cooking purposes uniformly as a rule?

A. It was good for bathing purposes, except at times when it became muddy, which I attributed to the heavy rains. I considered it good for cooking purposes as soon as it was boiled. Made pure in that way.

929 Cross-examination.

(By Mr. WIMBERLY:)

Q. What do you mean by saying that the water was unfit for cooking purposes unless it was boiled, can you cook without boiling?

A. If you can cook without it? I don't understand?

Q. You don't mean to say the water was unfit for cooking purposes?

A. No, sir.

Q. You were never a member of council?

A. No, sir.

Q. Did you ever take this matter with the board of health—are you a member of the health department here?

A. No, sir. I drank it at first; because I had been told that it was sent to a chemist and analyzed as pure water.

Q. Did you ever try to have any other analysis made?

A. No, sir.

Q. Ever report it to the health department?
A. No, sir. Sent to the pump here for water.
Q. Any request made for an analysis as a citizen or otherwise?
A. No, sir.
Q. You spoke of the times that you could not use it for irrigation, was that once or how often?
A. Quite a number of times in the summer, when it was very dry.
Q. Exceptionally dry weather?
A. Yes, sir.
Q. Do you remember what year that was?
A. That occurred, I suppose—I could not tell you, sir.
Q. About?
A. Several times.
Q. About?
A. Near mid-summer.
Q. About what year?
A. I could not tell you to save my life, only from being put on notice several times during my experience with the water.
Q. All one summer—same summer?
A. No, sir.
Q. How many summers?
A. Three or four. May have been every summer I used it, I could not say positively.
930 Q. Ain't you mistaken about the number of summers?
A. No, I can't be positive about that. Quite a number of times, 6 or 8 times, something like that.
Q. Most of it was one season, one year?
A. Don't think so.
Q. It was during exceptionally dry times in the summer?
A. Yes, sir; that's when I was notified to that effect. I told Mr. Horsley at the time that he ought not to charge me in the winter for the use of the water.
Q. You had a sprinkler for use in the garden?
A. Yes, sir.
Q. Did you have any meter?
A. No, sir.
Q. Did you have the privilege of sprinkling the street with your sprinkler on the sidewalk?
A. Yes, sir; had a sprinkler at my front gate.
Q. Did you have the privilege of irrigating your garden?
A. Yes, sir.

J. P. ALLEN, sworn by the respondents, testified as follows:

(By Mr. GUERRY:)

Q Where do you live?
A. I live in Aberdeen, Ga.
Q. Have you ever lived here in Dawson?

A. Yes, sir.
Q. When?
A. All my life until last year. This month a year ago.
Q. Do you know anything about the waterworks company's plant in or near the city?
A. Yes, sir; know a right smart about it.
Q. About this water?
A. Yes, sir.
Q. You ever have any experience with it?
A. Yes, sir; some.
Q. In what capacity?
A. Commercial purposes.
Q. Sir?
A. Used it for commercial purposes.
Q. Did you ever have any experience at the pumping station?
A. Yes, sir.
931 Q. In what capacity there?
A. As engineer.
Q. I wish you would state to the master the results of your observations during the performance of your duties there as engineer at any time while you were there about this water—about its condition?
A. It was sometimes muddy.
Q. Well, was the water muddy much or not?
A. Right smart, yes, sir.
Q. Any other troubles with it?
A. It was deficient in quantity.
Q. What do you mean by its being deficient in quantity?
A. Wasn't enough of it.
Q. For what purpose?
A. Filling the tank.
Q. To what extent was that true?
A. Well, right smart. If you had plenty of water and the pumps could run at full speed, you could get the tank full in three hours.
Q. When the water was inadequate, what was the trouble?
A. Just lacked for water.
Q. Not enough to fill the tank?
A. Had to run the pumps slow.
Q. How long would it take to do that?
A. Been times in which you could not get enough to fill it.
Q. At all?
A. No, sir.
Q. Until there was a rain?
A. Yes, sir; during dry weather.
Q. While you were making an effort to fill it, the time you have described, what would be the condition of the tank—the standpipe here in town?
A. Very leaky. Sometimes it would be hard to fill it on account of leaks.

Q. Because it leaked?

A. Yes, sir.

Q. When it was leaking and hard to fill for the other reasons you have mentioned, state whether at that time it was full or not or to what extent it was full?

A. I never left the station but what I had the tank full.

932 Q. You would get it full?

A. Yes, sir.

Q. Before you quit?

A. Yes, sir; before I would leave.

Q. How long would it take you to get it in that fix, sometimes?

A. Has taken as long as six hours.

Q. During that six hours what was the condition—what was the condition as to whether the tank was filled or not?

A. Well, we could only tell from the pressure gauge.

Q. While you were trying to fill it was not full?

A. No, sir; not full when we were trying to fill it.

Q. Was it sufficiently full for the purposes of pressure?

A. Well, I don't know whether it was or not.

Q. What were your instructions—to what extent were you to keep it full, as being necessary—as being required?

A. It was to be kept full in case of fire.

Q. You were required to keep it full?

A. Yes, sir.

Q. I understood you to say awhile ago sometimes you never succeeded at all in getting it full?

A. It would be hard to do sometimes. Have to keep the pumps going day and night to do it and then they wouldn't get it full, the tank leaked so bad.

Q. During the dry times, would you ever notice the condition of the water?

A. Sometimes it was very muddy and sandy.

Q. That is when it was dry?

A. On account of the suction. The water was low down and it would suck sand; and the sand would finally clog in the well and have to pump sand.

Q. What was the result on your pump?

A. It would cut the plungers and valves.

Q. What was the condition of the water at the particular time when it was very low, did you make any discovery about the condition of the water?

A. No, sir; only it was druggy.

Q. Don't mean from observation but otherwise: Did you drink any of the water at that time?

A. No, sir.

933 Q. Why?

A. Because I didn't like it.

Q. Why didn't you like it?

A. I didn't think it was fit to drink.

Q. What was the matter with it?
A. I thought it was unclean.
Q. How did you find that out?
A. By going up the stream where the water come into the pipes and what I noticed in working on the pumps.
Q. What did you notice in opening the pumps?
A. About an inch of corrosion and mud clinging to the walls—part of the pump.
Q. Did you ever make any discovery about this pump except with your eyes?
A. Yes, sir.
Q. How was that?
A. With my nose.
Q. What discovery was that: I can't lead you: what discovery was that?
A. Kind of an offensive odor like you will find in muddy streams.
Q. You spoke about going up the stream there—up the bottom, what discoveries did you make?
A. The water in dry times would be sorter low and it would be sandy and sand would be running into the inlet pipe. That's as high as I ever went.
Q. To the inlet pipe?
A. Yes, sir. I thought it should have been cleaned out; and I don't know if I didn't mention it to Mr. Horsley that there should be made a hole to keep the sand out.
Q. When you discovered that mud corrosion, what happened between you and Mr. Horsley—what was said between you and Mr. Horsley, the superintendent? Do you remember telling him anything about it?
A. I believe that's what I told him, about the sand and dirt there probably. I advised a well or something of the kind made
934 at the inlet pipe—mouth of the inlet pipe so as to keep off the sand and mud and keep it from entering when the water was low.
Q. What year was that?
A. I could not tell you to save my life.
Q. How long ago has it been? Two or three years?
A. I don't know, sir. Charley Griggs was running the pumps then. He was the engineer and I was helping.
Q. Five, six, ten, or 20 or one—give some idea about it?
A. Somewhere about '97 or '98.
Q. At that time when you made that suggestion to Mr. Horsley, was there any such well or any kind of protection at the inlet pipe?
A. No, sir; the ground was level with the inlet pipe—bottom of the stream.
Q. In pumping this water from there up in town, how was it collected together in the pumping station?

A. Run down an inlet pipe into a well—suction well—well the pumping suction goes into.

Q. During dry weather what was the trouble in getting clear water from that well—why was it that the water was not clear: Wish you would explain that to the court?

A. The pipes ran near the bottom of the well—never measured exactly how high they come from the bottom; and the mud and sand that would run down into the well from the inlet pipe, would be sucked up through the pump. The pump is what kept that from filling up, I suppose. Never was cleaned to my knowledge.

Q. Could you state, if the water had been in there clear, there had been no sand or mud, the water could have been pumped?

A. No, sir; it could not have been.

Q. Why?

A. Because the pumps would not prime themselves. They were cut very badly with sand.

935 Q. Suppose your pumps were all right, if the water had been clear, could it have pumped up clear water, if there had been no mud or sand in it?

A. Oh yes, sir. That's what I reported to Mr. Horsley, to make well for it. I reported to him that the plungers were worn so in pumping they would not prime itself and he got new plungers; and when I went back the second time I put the plungers in.

Q. What notice did you give to Mr. Horsley when you told him about the condition there—what did you tell him about the mains?

A. I don't know for sure whether I told Mr. Horsley or not. It was my impression if the pump sucked mud and sand out of the wells, it would fill up the mains.

Q. To the best of your recollection did you make that suggestion to him?

A. I don't know whether I did to him or not.

Cross-examination.

(By Mr. WIMBERLY:)

Q. How long did you work with the water works company?

A. Well, I was employed by them as engineer for 30 days.

Q. Who employed you?

A. Mr. Horsley.

Q. Why did he employ you?

A. He employed me, I suppose, because he thought I might be the only one that could put the regulators on those pumps, I don't know—thought I was competent.

Q. Didn't they have an engineer already?

A. Yes, sir; of course they had a regular engineer.

Q. What do you mean by regulators on the pumps?

A. Pressure regulator. Regulator feeds the steam to the steam end of the pump by the forced pressure of the water. You can set it anywhere you want to.

Q. You put them up, didn't you?
A. Yes, sir. It is an automatic machine.
Q. You were employed to put in those additional repairs?
936 A. Yes, sir; and then run the pumps.
Q. Then you ran the pumps as an assistant to Mr. Griggs?
A. No, sir; not an assistant to him. Merely an assertion of Mr. Horsley's that he would give Mr. Griggs the job if I would help him learn it.
Q. You were helping Mr. Griggs?
A. Yes, sir. That was a different time I put on the pressure regulators.
Q. What was the purpose of putting these regulators in?
A. It was to maintain a standard pressure in the mains—direct pressure.
Q. It was to put direct pressure in them during the time of that unusually dry spell?
A. No, sir; during the time of the construction of that new tank. Had no tank.
Q. You mean the present new tank?
A. Yes, sir.
Q. That was since this suit was filed?
A. Oh, yes, sir.
Q. At the time they were putting in the present tank?
A. Yes, sir; I was running the pump. While they were putting—while they had the old tank torn down and was putting up the new tank.
Q. It was while they had the old tank torn down and were putting up the new tank that you had that direct pressure?
A. Yes, sir.
Q. Because the tank was gone the direct pressure had to supply the water?
A. Yes, sir.
Q. To the system?
A. Yes, sir.
Q. Were you there more than once or is that the only time you have ever been with them?
A. In an *officious* way, you mean?
Q. Yes?
A. Employed by them?
Q. Yes?
A. That's the only way I was employed by them.
Q. The time you have been talking about, is that the time it sucked sand?
A. I spoke of two different times.
937 Q. The other time I want to get at?
A. The time I was helping Mr. Griggs—before that.
Q. How long before that was that?
A. I don't remember exactly the time. I remember it was during the dry season. Part of it was. I was there during the dry season.

Q. That is the time the wells all failed here in Dawson, an exceptionally dry season?

A. I don't remember as to that. I don't remember whether it was that dry season or not. I remember a good many wells failed.

Q. You don't remember whether that was the time or not?

A. No, sir.

Q. You do remember that it was an unusually dry season, don't you?

A. Yes, sir.

Q. And after you worked there helping Mr. Griggs, during that dry season, how long?

A. I suppose about two months. I could not swear as to that.

Q. During the whole of the dry season?

A. Yes, sir. It was my business and I would go and help him when he would ask for help.

Q. You helped him between time when he needed help?

A. Yes, sir.

Q. I understood you to say that you always left the tank full when you left there?

A. Yes, sir; when I was employed there. He never left there until the tank was full or he had another engineer to handle the pump.

Q. Always left it filled before he stopped?

A. I won't say it was full. The pumps were running or the tank was filled—tried to fill it.

Q. It was filled all the time you ran the pumps, during that exceptionally dry spell just took longer to fill it?

A. Don't think they had sufficient water to fill it. Kept running the pumps.

938 Q. You are only testifying during that dry spell and never at any other time?

A. The time we were running the direct pressure we had plenty of water.

Q. The time you speak of when you were running the direct pressure, the time you were helping Mr. Griggs, do you remember how often it was that you noticed it sucking sand, as you call it?

A. When the water was low?

Q. Yes?

A. Sucked it all the time.

Q. How long did it remain?

A. If you let the pumps stop for a few minutes and let the well fill up, you could not tell whether it was sucking sand. I have seen the well dry, and the pumps would suck away.

Q. Then you would stop and let it fill up again?

A. Yes, sir; would not run it fast.

Q. When you found it was sucking sand you would quit running it so fast: It was during that dry spell that the hotel burned, wasn't it?

A. Yes, sir; but I don't know that that was——

Q. Had plenty of water on that occasion, didn't they?

A. I don't know that it was the dryest part of the dry spell. We had plenty of water to keep the fire department going.

Q. You kept the supply up during that whole fire?

A. Don't know how much they needed. Give them all we could get.

Q. You kept them in water?

A. Kept using the water. I don't know how much they needed.

Q. The water didn't give out. You gave them water to the last?

A. It would have given out if we had run fast.

Q. But it didn't give out?

A. No, sir; wouldn't let it give out.

Q. You kept running during that whole time?

A. Yes, sir; kept the pumps going steadily. Enough water to have filled the tank if there hadn't been a fire.

939 Q. The fire lasted several hours?

A. Yes, sir.

Q. Enough water to keep the tank perfectly full if they had not been using it at the fire?

A. Yes, sir. Just filled it up. Went down about nine o'clock and started the pump running and it was running when Mr. Horsley came down with the alarm. Had the tank full then.

Q. Had it full when the fire started?

A. Yes, sir.

Q. You had it full when it started and you kept water on hand during all that time?

A. Yes, sir; just about ready to leave when he came in and said the town was on fire.

Q. You staid there and kept water as fast as they used it?

A. Give them both pumps then.

Q. Both pumps you gave them?

A. Yes, sir.

Q. You had plenty of water before then, didn't you?

A. Yes, sir; had plenty right at the start.

Q. You spoke of the time it was deficient in quantity, it was during that dry spell—you never knew the water to be deficient in quantity except that dry spell?

A. Yes, sir.

Q. When you speak of its taking you a longer time to fill it, that was when your water supply ran slower; but you would always fill it during that dry spell?

A. Don't know as I did. When the weather was so dry we kept the pumps going.

Q. So as to give the pressure from the pumps?

A. No; could not give the pressure from the pumps when the tank was up.

Q. Whenever it wasn't full you kept the pumps going until you got it full?

A. Tried to fill. Kept them going day and night whether we got it full or not.

Q. Didn't you testify just now that you never did go until—you never did leave there until you got it full?

A. We made an effort to fill the tank. If the supply wasn't sufficient, we kept the pumps going for 30 days straight along or we would fill the tank.

940 Q. Worked day and night?

A. Yes, sir.

Q. If necessary?

A. Yes, sir.

Q. You never relaxed your efforts to furnish all the water that was there during that dry spell until you got the tank absolutely full?

A. No, sir.

Q. If you had to work all day and all night?

A. I was the day man there.

Q. They had a man to work all night too?

A. Well, I was the day man during the time they were using the direct pressure. They had a day and night man during the dry weather. My brother was the night man.

Q. Your brother was the night man?

A. Yes, sir.

Q. Now you speak of its being dreggy and sucking sand; and you spoke of some corrosion being on the pump, there is a lining on the inside—what do you call the plungers—describe the plungers?

A. The plungers work through the inner wall in the pump, makes two different compartments, a simple displacement pump. The inner walls of the pump is never touched by the plunger at all. Touches where it slides through this partition wall.

Q. Where the iron corrodes the most never touches the plunger at all?

A. No, sir.

Q. On account of the lining?

A. Yes, sir.

Re-direct-examination.

(By Mr. GUERRY:)

Q. When these continuous efforts were being made to supply the tank, when you would have to run for 30 days, could the pumps go on all the time when the water was very low?

A. Yes, sir; they could keep moving. Couldn't run them fast.

Q. Why couldn't you?

A. Because the supply wasn't sufficient

941 Q. You say sometimes you would run slow, at other times what would you have to do when the water was very low and no water there?

A. When the water is very low you can keep running the pumps at highest speed if you have a full well to start with and run fast until you get the well down, then you would have to slow up.

Q. Would you finally have to desist—what would you finally have to do besides slow up when it got very low?

A. I don't know. We have had to shut down.

Q. Entirely?

A. Not entirely, because the well would be gradually filling up all the time. Run slow and pump it out as fast as it came in.

Q. You would have to accommodate yourself as to the quantity of the water?

A. Yes, sir.

J. S. LOWREY, sworn by the respondents, testified as follows:

(By Mr. GUERRY:)

Q. How long have you lived in Dawson?

A. 25 years.

Q. What experience have you had with the water of the Dawson Waterworks Co.?

A. Well, in '92 I lived on Main street and I had a pipe run in the rear door to be used for cooking purposes, you know.

Q. You ever use it in any other way?

A. I tried to use it for cooking purposes but I could not use it.

Q. What was the trouble with it?

A. Muddy and had a bad odor to it.

Q. When was that?

A. In '92.

Q. What times of the year was it?

A. In the spring and summer.

Q. Have you used it ever since then?

A. We cut it off then and since I have been living on Lee street I tried it again.

Q. When was that?

A. This year.

942 Q. What was its condition then?

A. Tried it last year. Got it in my yard and every once in awhile I try it.

Q. Last year what was the result?

A. Same trouble.

Q. This year?

A. Same trouble. Has a red color to it and is offensive.

Cross-examination.

(By Mr. WIMBERLY.)

Q. You are a nephew of the present mayor?

A. Yes, sir.

Q. You were a member of council in '94, were you not, when you passed the resolution of June 27th?

A. Yes, sir.

Q. Though you were a member of council at the time, you never made any complaint to the waterworks company of the quality of water or the service?

A. No.

Q. Either officially as councilman or as an individual?

A. No, sir.

Q. You have never made any request for a change in the source of supply or improvement in the source of supply or the service?

A. How is that?

Q. You have never made any complaint as to the source of supply, or the character of the water furnished, or request for any improvement, have you?

A. No, I quit it.

Q. Speaking about the time when you were in council when council passed this resolution, council never has made any complaint?

A. Well, I don't know, sir.

Q. You know of none, do you?

A. Made complaints about the inadequate supply of water.

Q. Not speaking about the testimony you all gave in these affidavits. Outside of these affidavits since the beginning of this suit, they never made any complaint, did they, as to the character or service or as to the pressure?

A. Well, I think you will find some complaints made as to the pressure in the affidavits.

943 Q. Affidavits in this case: except in that way?

A. No, sir; I don't know of any.

Q. Prior to this suit?

A. No, I don't know of any.

A. R. LAMAR, sworn by the respondents, testified as follows:

(By Mr. GUERRY:)

Q. Are you a practicing physician?

A. Yes, sir.

Q. How long?

A. Been practicing about eight years.

Q. Where have you been living during that time?

A. Been living in Terrell county all the time. In the city of Dawson about two years and six or eight months.

Q. Have you had any experience with the water of the Dawson Waterworks Co.?

A. Ye-, sir.

Q. When?

A. Been using it down here for the purpose of irrigating yards and in the barn watering horses.

Q. Why haven't you used it for other purposes?

A. Used it for cooking purposes—part of the time used it for cooking purposes.

Q. How else have you used it?

A. In the bath room.

Q. Used it for drinking purposes?

A. No, sir; didn't drink it.

Q. Why not?

A. Found it was bad.

Q. In what way?

A. It has an odor.

Q. You mean by having an odor that it is offensive?

A. Yes, sir; offensive. I also saw if you draw it from the hydrant and let it stay over night in a pitcher it would have an odor about it.

Q. What shape would it be in?

A. Bad odor, most of the time, after sitting awhile.

Q. Was that water unwholesome?

A. I considered it unwholesome, so much so that I didn't drink it.

944 Q. Is it fit for domestic purposes or not?

A. It is all right for cooking purposes if it is boiled.

Q. As received in its first condition is it fit for cooking, as a rule—not talking about when it is muddy, in its worse state?

A. I want to explain that it is all right for cooking, if you are going to use it for cooking, if you will boil it. I would not have used it for anything to take internally, in any way, unless it was first boiled.

Cross-examination.

(By Mr. WIMBERLY:)

Q. Are you a member of the board of health here?

A. No.

Q. You have a board of health in Dawson, have you not?

A. Not that I ever heard of.

Q. You have never made any analysis of this water?

A. No.

Q. Requested one made?

A. No, sir.

Q. Made no complaint about it to the health authorities?

A. No, sir; have not. Have made no formal complaint.

Q. How long you say you have been a patron of this water?

A. About two years and eight months—ever since I have been in the city.

Q. How long have you used it for drinking purposes?

A. Never, only when we could not get any other. Been using artesian water from the town pump.

Q. What you say about this water is not based on any actual test?

A. It is so far as drinking.
Q. How often have you noticed anything offensive about it?
A. Very often. Could not tell you how often.
Q. Can you give——
A. As I said awhile ago, if you draw it out of the hydrant and let it stay over night, bucket or pitcher, it will always have a bad odor.
Q. How often have you let it stay over night in a bucket or pitcher to see?
A. About 365 days in a year.
945 Q. Always offensive in the morning?
A. Not always but nearly always so.
Q. What do you mean by offensive?
A. Has a bad odor.
Q. There is an odor after it settles in the pitcher?
A. Yes, sir.
Q. Something peculiar about the pitcher that gives it the odor?
A. Nothing in the pitcher. Never noticed that.
Q. Will you explain why it is if it stays all night in a pitcher it acquires an odor?
A. Could not hardly explain that. Coming in contact with the air, the animals in the water or the vegetable matter——
Q. You could not explain how it is that this water when in an open tank, exposed to the air, and in an open stream exposed to the air, never acquires anything offensive, but let it stay in a pitcher over night it gets offensive?
A. Running water, as I understand it, purifies itself by coming in contact with the air; and standing water, especially if there is any nitrogenous material in it, putrifies.
Q. Your idea is standing over all night in a pitcher it putrifies?
A. Yes—that is, I can't explain it any other way.
Q. You never made an analysis of it?
A. No, sir.

Re-direct-examination.

(By Mr. GUERRY:)

Q. Water allowed to stand in the way described, if pure, would it putrify?
A. Would not expect it to, no, sir.
Q. What is the cause of putrefaction in it?
A. It is the nitrogenous material in it.
Q. Explain a little more fully?
A. Vegetable and animal matter.
Q. That causes putrefaction?
A. Inorganic, yes, sir.

946 Re-cross-examination.

(By Mr. WIMBERLY:)

Q. You mean to say that putrefaction——

The MASTER: I don't think that is in rebuttal. You have examined him on that.

CHARLES DEUBLER, sworn by the respondents, testified as follows (re-called):

Q. I believe you stated you live near this new tank.
A. Yes, sir; right across the street.
Q. The top of it is open?
A. Yes, sir.
Q. The old one was covered?
A. Yes, sir.
Q. What have you noticed on top of the new standpipe at different times?
A. I have seen buzzards roosting up there.
Q. In the day time or night?
A. Day time. Seen as high as six there at one time.

Cross-examination.

(By Mr. WIMBERLY:)

Q. When was that?
A. It has been within the last two weeks. You can see them there most anytime in the day as many as one roosting there.
Q. You have noticed them in the last two weeks?
A. Yes.
Q. How far back?
A. Directly after it was built. It is a fine roosting place.
Q. It is a roosting place for buzzards?
A. Yes, sir; roost awhile and then sail off and another one will come there.

E. J. CAMERON, sworn by the respondents, testified as follows:

(By Mr. GUERRY:)

Q. What is your age?
A. Twenty nine.
947 Q. Where do you live?
A. I claim Americus my home. I work in Dawson. Been in Dawson two years or a little over.
Q. What position do you hold in Dawson?
A. Chief of the fire department.
Q. What experience have you had as chief of the fire department

and in connection with fire departments in cities—in the service of cities and the people in putting out fires?

A. I have been in the actual business about 12 years. Before that, ever since I was a kid I have been connected with the fire department—volunteer system; and paid system about 12 years.

Q. In the use of water what experience have you had with reference to it in putting out fires—in what different capacities have you acted?

A. From the bottom up to the head of this department, sir. Started in Americus as regular fireman and promoted there as foreman and from there chief here. Left Americus and came here.

Q. You consider yourself then a practical fireman, that is, a man whose business it is to put out fires in the employment of water and apparatus for that purpose?

A. Yes, sir.

Q. Have you studied the subject and made observations during these periods of time?

A. Yes, sir.

Q. During your experience?

A. Yes, sir.

Q. Take this case: by means of a waterworks and its equipment, the pressure is sufficient for the purpose of throwing a stream of water 50 feet in still air, vertically through hose 100 feet long and with a one inch nozzle, what would be the difference in the distance that the water was thrown, all the other conditions being the same, except using hose 200 feet long?

A. Be very little difference in it.

Q. How much?

A. Would not be more than a foot or a foot and a half at the outside.

948 Q. Suppose it was increased to 300 feet?

A. I don't think the increase would make very much difference.

Q. Three hundred feet?

A. No, sir.

Q. Suppose 400 feet?

A. Make very little difference, some few feet—three feet. Every section you add on adds a little to friction, of course.

Q. I will get you to describe to the court the action of the pressure of the water in the hose—which action takes place?

A. From what I have seen and experimenting with water, 2½ inch hose with one inch opening, the water pulls back through as it empties—pulls through the hose and kind of forms a surface of its own to bear against; and the friction is not altogether on the side of the hose. It is kind of like turning the hose wrong side outwards, the water pulling through. It is also in a whirl, going around in a great whirl,—creates a whirl.

Q. You have been in charge of this department here since the paid department was organized?

A. Yes, sir.
Q. When was that?
A. 8th of November, '99, I believe.
Q. What is the pressure since you have been here?
A. For the last 5 or 6 months we have had a gauge to tell the pressure. Before that we had no gauge. Get now about 58 pounds in the engine house.
Q. How high will it throw the water ordinarily as now equipped and kept up, so far as you know?
A. Ordinarily we get—we made one test of it out there on the end of a line and it throwed the water, I suppose, a little over 50 or 55 feet.
Q. Vertically in still air?
A. No, the air wasn't still.
Q. Certainly then in still air it will throw it that high?
A. Yes, sir; will go that high, may be more. The water went above the electric light a good deal with a breeze blowing.

Q. Get you to state whether you have attended any fires
949 here during this time?

A. Yes, sir.
Q. When this waterworks water was resorted to?
A. Yes, sir.
Q. What length of hose have you used at different times?
A. Various lengths. One time the longest length I know of was about 1600 feet or more. 1600 feet from the plug we used to the fire.
Q. How far was the water thrown—did you use a one inch nozzle?
A. No, sir.
Q. What size nozzle was it?
A. Three quarters.
Q. How far did it throw it on that occasion?
A. About 45 feet.
Q. That was 1600 feet with ¾ inch nozzle with the present tower?
A. Yes, sir.
Q. It threw it that high you mean?
A. That far in distance—this water. Above a chimney that I measured this morning—at least made a rough estimate of it, about 27 feet high. I know it went above that.
Q. It went more than 27 feet high?
A. Yes, sir; more than 27 feet high.
Q. From the surface of the ground immediately below?
A. Yes, sir.
Q. At other times what length of hose have you used since you have been here?
A. Anywhere from 150 feet up.
Q. Up to 1600?
A. Yes, sir.
Q. During those times what difficulty has there been in throwing the water as high as 40 or 45 feet?

A. There has been none since this tower was erected.

Q. You had nothing to do with it before?

A. Yes, sir; while they were working under direct pressure I used it.

Q. You have never had any experience with the old tower?

A. No, sir; I think it was being removed when I came here.

950 Q. During these occasions when you have used the various length of hose up to 1600 feet, how high was the water thrown on those occasions?

A. Had sufficient pressure necessary for all purposes. Never paid special attention to it. I suppose 50 feet or more, owing to the location.

Q. Well, since you have been here dealing with this present tower, has there been any time when there was an absence of pressure?

A. Yes, sir; once that I know of.

Q. To what extent was it absent then?

A. For twenty minutes I suppose, I know there was no water in the tower—no water came up here in the engine spigot. I don't know the date. It has been some 6 or 7 months ago. I immediately notified Mr. Baldwin and Mr. Deubler. I thought there might be a burst in the mains or something to cause the leak or the tank run dry without their knowing anything about it.

Q. How did you discover that the tank was dry?

A. On Saturday morning started to washing a wagon and the boy complained there was no water coming out from the faucet.

Q. Explain a little more fully?

A. I went and tried the faucet and there was none there.

Q. How long before you did have water?

A. I tried it again in about twenty minutes and water was coming in full pressure.

Q. How long had the tank been dry—before you tried it first?

A. I don't know, sir. Had no gauge and could not tell how the pressure was.

Q. That the only time?

A. Only time I know *if*, yes, sir. I don't know that the tank was even dry that time, or what was the matter with it. No pressure in the mains.

Q. Have you noticed any visitors upon the opening of this tank?

A. Yes, sir.

Q. Who were they.

A. Buzzards.

Q. State to what extent?

951 A. I have seen anywhere from one to a dozen, I suppose, around there.

Q. At a time?

A. Yes, sir.

Q. How often?

A. Well, as many as half a dozen times. I have seen them at odd times when I would drive by, noticed buzzards on top.

Q. Which way were they facing?

A. Seemed to be both ways.

Q. See any signs of droppings?

A. White streaks below there. That is not at all times. Think the overflow of the tower would wash them off.

Q. Do you know whether Mr. Horsley knows about it or not?

A. About the droppings or not?

Q. About the visitors, Mr. Horsley?

A. Yes, sir; I talked to Mr. Horsley, I think.

Q. When was that?

A. Directly after I noticed it. I told him and he remarked something to me about covering the tower over. Said he would cover the tower over.

Q. How come you to mention it to Mr. Horsley?

A. I was talking to him about the condition of the water of the Dawson Waterworks Co.

Q. Said he knew it, did he not?

A. He said he had heard of it but didn't believe it until he had seen it. Went over there and saw for himself.

Cross-examination.

(By Mr. WIMBERLY:)

Q. Mr. Cameron, you look after the matter of pressure inside of the city as closely as you reasonably can do it, don't you?

A. Yes, sir.

Q. You are at all times on the look out?

A. Yes, sir.

Q. I understand you to say that during the two and one half years you have been here, if there has been a failure of water in the tower for more than 20 minutes, you don't know it?

A. No, sir.

952 Q. Only occasion?

A. Yes, sir.

Q. In any city where they have waterworks they occasionally have to shut off the water to make repairs?

A. Yes, sir.

Q. You are liable to have it shut off from the main?

A. Yes, sir.

Q. And shut it off from any particular part of the main?

A. Yes, sir.

Q. So that 20 or 30 minutes for the water to be shut off in any system in Dawson or other places would not be at all unusual time, would it?

A. No, sir.

Re-direct examination.

(By Mr. GUERRY:)

Q. When you came here did you find any hose here?
A. Yes.
Q. Of different sizes?
A. No, sir.
Q. I mean lengths?
A. Yes, sir.
Q. What were the different lengths?
A. Anywhere from 25 to 50 feet. Those were lengths been cut off and the coupling moved back.
Q. About how much was there altogether?
A. I can tell you in one minute by doing a little figuring: about 1300 feet.

Re-cross-examination.

(By Mr. WIMBERLY:)

Q. You mean you are using 1300 feet of old hose?
A. Hose here when I came here.
Q. The balance of it you have replaced with new hose?
A. Yes, sir.
Q. You found that old hose in a pretty dilapidated condition, didn't you?
A. No, sir. Got about 1200 feet of it in service now—hardly that much. I have worked on some of that hose and put it in good condition.
Q. How long will hose ordinarily last—good hose?
A. I think it is guaranteed for four years, I believe. I
953 have known some to last for 12 or 14 years.
Q. These short lengths are old hose cut down?
A. Not necessarily, possibly run against a nail and cut it. Got a new section of hose over there that got cut the second trip we made, got caught on a nail.
Q. Some accident will sometimes damage it?
A. Yes, sir.
Q. Sometimes if hose is worn out at one end, you cut that end off?
A. Yes, sir; from bad abuse.
Q. Bad abuse?
A. Yes, sir.
Q. There is a big difference in the efficiency of a paid department and a volunteer department, where everybody is sorter mixing in it without much order, and a system with which you fight fires?
A. Yes, sir.
Q. Since you have had a paid department, a regular paid organized department with system and skill, you have had practically no destructive fires, have you?
A. None, no, sir.

Q. How many fires did you have in Dawson last year?

A. Twenty one.

Q. I believe you have had it two years: Take the one before that, how many did you have?

A. After I came here, the first fire was 11/17/99, in this book. That is the first I answered.

Q. Take from then, how many did you have until the end of '99?

A. Had six, I think.

Q. During 1900 how many did you have?

A. Twenty one.

Q. Twenty-one in 1901?

A. Yes, sir.

Q. You have not made up your full report for this year?

A. Yes, sir.

Q. How many?

A. Two.

Q. What was the total loss during the time covered by your last report, out of 21 fires?

A. $804, I believe.

Q. Out of the whole number of fires?

954 A. Out of last year's report.

Q. How about the year before that?

A. Don't remember that. Something small, not over $2000. That includes fires out beyond the reach of the waterworks.

Q. The fire loss has been very small, hasn't it, in Dawson, since they have had an efficient fire department?

A. Yes.

Q. How does that compare with other cities?

A. With other cities that I have had experience with very good since we have got the new tank as it is now.

Q. Since you have got a new fire department?

A. Yes, sir.

Q. How does your fire losses compare with other cities?

A. Had about as little fire loss last year as any town in the State. Our per centage about as little and a good deal more than some that was better equipped.

Q. You speak of friction loss through hose, it is greater through old, defective hose, is it not?

A. Why I should think so. If old, defective hose has got holes in them, every hole adds—lessens the pressure at the end of the nozzle.

Q. On a long line of hose the loss from old hose would be very much greater than on a short line?

A. Yes, sir.

Q. The longer the line of old hose the bigger the loss?

A. Yes, sir.

Q. In fact, if you had 500 or 600 feet of old defective hose, time you got out to the end you would hardly have any pressure at all?

A. No, sir; if defective enough you would have no pressure there.

Q. Prior to the purchase of the 1000 feet of hose about a year before you came, at the time they reorganized, the city had very little new hose, didn't they?

A. Why they had no actually new hose. Had some been bought for a year or more.

Q. Except for that purchase the other was old?

A. Some of it was pretty old.

955 Q. On these four inch mains, I am speaking about the mains off the main business street, where these fires are alleged to have occurred, when you put on more than one line of hose, particularly if they are long lines of hose, why it diminishes the pressure appreciably, does it not?

A. Yes, sir: a long line of hose. Two lines of hose from one plug will diminish the pressure.

Q. And two from the same main, I mean two plugs from the same main, one here and one back further on the same main, also diminishes the pressure?

A. Yes, sir.

Q. Where you put on one stream additional it very materially diminishes a small four inch main?

A. Yes, sir.

Q. Where a fire is handled by firemen who know how to handle hose and are skilled, they regulate the number of hose lines to the size of the main?

A. Yes, sir.

Q. You could not get satisfactory results any other way?

A. No, sir.

(By Mr. GUERRY:)

Q. What hose did you use on this occasion when you had 1600 feet of hose?

A. All, I believe, was old hose. The hose I found here. I am not sure. All or the greater part of it was old hose. I mean by old hose, hose that was purchased before I came.

Q. Now some of these fires were put out by chemicals?

A. Yes, sir.

Q. What proportion of them?

A. Twelve since I have been here.

Q. What main was this 1600 feet attached to?

A. From the main on Main street—Bethune corner.

Q. Now what was the difference between the altitude there and the altitude where you threw the water on the fire?

A. May be possibly a little lower than Main street, a few feet.

956 Q. What was the difference in the size of the nozzle on that occasion—suppose it would have been a one inch instead of a $1\frac{1}{8}$?

A. We would hardly have gotten any pressure.

Q. With a one inch?

A. Yes, sir.

Q. Mr. Wimberly asked you about the effect of two lines of hose on the same main, I will submit to you a case: Suppose on one of the mains a hose of 100 feet length should be attached and used; and at the next plug—do you know how far these plugs are from each other?

A. It varies. Don't suppose any two are the same.

Q. The Littleton plug and the one in front of Erwin's, how far are they apart?

A. About 400 feet.

Q. Take these two plugs. The one at the Littleton plug you attach hose say 100 feet long, one inch nozzle and use it, full pressure; and at the other plug there is other hose turned on and used simultaneously, to what extent would it reduce right there in that locality the flow of water through the Littleton plug, assuming you had pressure there that would produce vertically, through 100 feet of hose, with a one inch nozzle, a stream 50 feet high?

Objected to as not being in rebuttal and objection overruled.

A. I don't suppose—of course I have never made a test of that, I don't suppose that it would make more than four feet difference in the two streams, possibly ten at the outside.

Q. Suppose the Littleton plug is nearer the pressure—the tower than the other plug, what difference would it make?

A. Of course I have only got my own opinion, I have never tried anything of this kind: If the plug this side would get the water first, the pressure would be greater than at the other end.

957 Q. What do you mean by this side?

A. Near the tank.

(Mr. Wimberly here started to examine the witness)

The MASTER: I think that is in rebuttal of your question.

Mr. WIMBERLY: I don't think I can allow anything further in rebuttal of that.

Dawson Waterworks Company.

J. A. Horsley, superintendent.

Year 1892.

Total number of acres of land, 8; district 11; aggregate value of land, $380.00, aggregate value of city or town property $1500.00; stocks and bonds $16,615.00; value of household and kitchen furniture, pianos, organs, libraries, pictures, etc., $5.00. Value of all other property not before enumerated $1500.00; aggregate value of whole of property $20,000.

Dawson Waterworks Company.

J. A. Horsley, superintendent.

Year 1893.

Total number of acres of land, 8; district 11; aggregate value of land $380.00; aggregate value of town or city property $1500.00; value of stocks and bonds $16,615.00; value of house-hold and kitchen furniture, pianos, organs, libraries, pictures, etc., $5.00; value of all other property not before enumerated $1500.00; aggregate value of whole of property $20,000.00.

958 Dawson Waterworks Company.

J. A. Horsley, supt.

Year 1894.

Total number of acres of land 8; district 11; aggregate value of land $380.00; aggregate value of city or town property $1500.00; amount of money and debts of all kinds, including notes, accounts, etc. $16,625.00; value of household and kitchen furniture, pianos, organs, libraries, pictures, etc. $5.00; value of all other property not before enumerated $1,490.00.

Dawson Waterworks Company.

J. A. Horsley, supt.

Year 1895.

Total number of acres of land 8; district 11; aggregate value of land $380.00; aggregate value of city or town property $1500.00; iron works, foundries, etc. $16,625.00; value of household and kitchen furniture, pianos, organs, libraries, pictures, etc. $5.00; horses, mules, hogs, sheep, cattle and all other stock $1490.00; plantation and mechanical tools $1490.00. Aggregate value of whole of property $20,000.

Dawson Waterworks Company.

J. A. Horsley, supt.

Year 1896.

Total number of acres of land 8; district 11; aggregate value of land $380.00; aggregate value of city or town property $1500.00; iron works, foundries, etc. $16,625.00; value of household and kitchen furniture, pianos, organs, libraries, pictures, etc. $5.00; horses, mules, hogs, sheep, cattle and all other stock, none; value of all other property not here-before enumerated $1490.; aggregate value of whole property $20,000.

959 Dawson Waterworks Company.

J. A. Horsley, supt.

Year 1897.

Total number of acres of land 8; number 32; district 11; aggregate value of land $380.00; aggregate value of city or town property $1500.00; value of household and kitchen furniture, pianos, organs, libraries, pictures, etc. $5.00; value of all other property not before enumerated $18,115.00; aggregate value of whole of property $20,000.

Dawson Waterworks Company.

J. A. Horsley, supt.

Year 1898.

Value of all other property not before enumerated $20,000; aggregate value of whole of property $20,000.

STATE OF GEORGIA,
Terrell County.

I, J. W. Roberts, ordinary and *ex-officio* clerk of the board of commissioners of roads and revenues of said county and State, do hereby certify that I am the custodian of the tax digest of said county of Terrell and State of Georgia, and that the above and foregoing is a true and correct transcript of the tax digest of said county and State; that the same contains all of the property that is shown by said tax digest in regard to the property of the Dawson Waterworks Co., of Dawson, Terrell county, Georgia, during the years stated, as returned by said waterworks company and that said board of commissioners has a seal.

Given under my hand and seal of office this the 10th May, 1899.

J. W. ROBERTS,
Ordinary, and Ex-officio Clerk of Commissioners of Roads and Revenues.

[Seal of Board of Commissioners of Terrell County, Ga.]

Respondents then closed.

960 J. A. HORSLEY, recalled by the complainant, testified as follows:

(By Mr. WIMBERLY:)

Q. You have heard the witnesses testify as to the length of hose at the different fires: At the McClellan fire on Lee street, June '98, did you make any measurement of the hose at the time?

A. Yes, sir; I counted the sections.

Q. Why did you do that?

A. Because it was my duty to do it.

Q. You always do that, do you?

A. Yes, sir; in nearly every case.

Q. State to the court what the length of hose at that fire—the number of hose lines?

A. The hose that was attached to the corner at Col. Parks' residence, was 13 sections, 650 feet.

Q. Take up the others?

A. The second hydrant the hose was attached to was in front of the Littleton house, seven sections, 350 feet. Next one was attached to the last hydrant on Lee street, in the corner of Mercer and Lee street, seven sections, 350 feet. These three lines of hose was attached to a six inch main on Lee street.

Q. Just give the lines of hose at the different fires, the length of the hose lines, the number of hose lines used: I will ask you this question: Did you make measurements from the plugs to which the hose lines were attached in the case of any of the fires during the time Mr. Deubler spoke of, covering the years '97, '98 and '96?

A. We measured these plugs out here on these streets.

Q. Which one, you mean the McClellan fire?

A. Yes, sir.

Q. What was the distance?

A. From one plug to the other?

Q. No, the place where the fire occurred: Take the plug on 4th avenue, when the witness said the hose was moved around on 4th avenue?

A. That would have come across a block and a half—two
961 thirds of a block. This plug is 300 feet.

Q. Did you make measurement of that specific distance?

A. Yes, sir.

Q. How far is it?

A. From 4th avenue along Griggs street is 358 feet and 8 inches to the corner of the street; and from Third avenue to Lee street is 308 feet and six inches, with a 31 foot alley from the corner of Fourth avenue.

Q. How much distance is there from that main to the fire?

A. 500 feet.

Q. 350 and 300: Take your figures and add them—take the three and add them?

A. 697 feet.

Q. That is the distance from that plug Mr. Seay said it was attached to to the corner of Lee street where that McClellan fire occurred?

A. Yes, sir.

Q. Something was said by Mr. Deubler about the hose lines at the Green and Whitehard fire, how many hose lines were used there?

A. Had two lines there.

Q. What was the length of those two, June 11, '97?

A. One was 450 and the other line 600 feet.

Q. How did you measure that?

A. By sections, counted the sections, 50 feet sections. Now the first line of hose was attached to it I reckon 3 or 4 minutes before the second line and Mr. T. D. Sale, who was a member of the fire company at that time, remarked to me better not shut the water off and attach the second line because that would burn the second house if he did The first house was too far gone time the fire company got there, the Green house. The second line of hose was attached to the same plug. Shut off the water and attached the second line of hose.

Q. At the Dawson Variety works, what was the length of hose?

A. 550 feet. That was attached to the plug on Orange
962 street. Last plug on Orange street going north.

Q. Without going through all these different fires, prior to the time Mr. Deubler testified, what can you say as to the length of hose and the number of hose lines used at these different fires?

A. Most of the time a good deal more hose pulled off than was necessary to reach the fires. I called their attention several times to the fact that they had pulled off more hose than they needed.

Q. Can you mention any particular fire?

A. Take for instance this big fire over here, there was from 8 to 10 streams——

Q. The Baldwin block?

A. Yes, sir.

Q. That was the one on Main street?

A. Yes, sir; the fire originated on Fine street in the hotel.

Mr. WIMBERLY: I understand your honor's ruling don't go into the actual pressure, or the height of the stream at the different fires, but as to the conditions that existed there?

The MASTER: Yes.

Mr. WIMBERLY: And not as to the height the water was thrown.

Q. What was the condition of the hose about the time these fires occurred—at the time they occurred?

A. At the Green fire there was one line of hose that was very bad.

Q. The other fires, what was the condition of the hose generally?

A. Some of it was old. I remember—I don't know whose hose it was, that was attached to the plug in front of Statham's stable over there——

Q. Don't go over that. You went over that the other day. What about keeping the water in the tank: Do you know whether the old tank was kept full of water or not?

A. Yes, sir; we kept it comparatively full pretty well all the time.

Q. Do you remember the time that Mr. John Allen worked out there?

A. Yes, sir.

963 Q. What sort of supply of water did you have—I mean at the time he was helping Griggs?

A. He was there at this big fire here.

Q. The Baldwin fire you mean?

A. Yes, sir.

Q. The Farnum House fire?

A. Yes, sir.

Q. You remember anything about that particular drough: One occur while he was there?

A. I don't remember about the drouth now.

Q. Do you remember about any unusual drouth they had here?

A. Yes, sir; I remember one time, only once, that I requested the people to shut off their yard sprinklers. It was a very dry season. Just one day I made that request.

Q. Explain about Dr. Goneke's garden sprinkler?

A. It ran several times and a good many times all night. I spoke to him about it several times, he and various others.

Q. What was your complaint to them, that the weather was dry?

A. The weather was dry and it was against the rules to run the sprinklers like they were running them.

Q. That is the complaint you made?

A. Yes, sir. Sometimes during a real cold spell of weather that would run the spigots not only the sprinklers but the spigots in different parts of the house to keep the pipes from freezing.

Q. Did you do what you could to prevent that?

A. Yes, sir.

Q. When the water ran off, as it did once or twice, did you correct it as promptly as you could?

A. Yes, sir; the pressure was not down over 30 or 40 minutes. I have a pressure gauge in my house and can tell all the time.

Q. What have you done all the time since you have been in charge to maintain the pressure?

A. I have done my best to keep it up and succeeded, I think, with the exception of one or two occasions that I spoke of the other day.

964 Q. About that horse, who reported that to the chief of police?

A. I did.

Q. Why did you report it to him?

A. Because I knew it was wrong to let it stay there, people getting water from that stream, it was my duty to keep as perfect water as I could.

Q. Did you try to do that at all times?

A. Yes, sir.

Q As soon as you discovered it was up there, what did you do?

A. I went to the chief of police at once, knowing they had the authority to have it removed. I had no legal authority.

Q. That's the way he come to move it?

A. Yes, sir.

Objected to witness stating that he had no legal authority.

The MASTER: Note the objection and I will rule on it later.

Q. What complaint has anybody ever made as to the quality of water at the branch of the waterworks company?

A. Several times they complained to me about its being muddy.

Q. When was it muddy that way?

A. Several times after these bid rains. As soon as that complaint was made to me I would flush the plugs.

Q. Except that any other complaint?

A. Yes, sir; on one occasion some one muddied the stream. My engineer complained to me about it; and as soon as that was done I went and reported the matter to the mayor—as soon as I found out the cause of its being muddy——

Objected to as hearsay.

The MASTER: Note the objection, Mr. Stenographer.

Q. State whether or not you ever flushed the hydrants at times other than when people complained?

A. Yes, sir; it has been our rule all along to slush the hydrants.

Q. You do that from time to time?

A. Yes, sir. Up to six months ago I flushed them more than I have in the last six months. Mr. Lowrey complained at me about washing up the streets.

Q. Who was Mr. Lowrey?

965 A. The mayor. Said I would have to stop washing up the streets.

Q. That's when you were flushing the pipes, getting the mud out of them?

A. Yes, sir; flushing the mains and Mr. Lowrey complained at me about it.

Q. Do you know anything about the dry kiln fire down here? Any mud coming out of it down there?

A. No, sir; do not.

Q. Any odor in the water, smell, anything of that kind?

A. Well, sir; I never detected it myself.

Q. Ever been any complaint?

A. Of course I am not around home there. Don't use the water there.

Q. Any complaint made as to the odor brought to your notice?

A. I have had them to ask me to flush the mains so that the water would be clear. Once or twice.

Q. The odor?

A. Once or twice some one complained about its smelling, and asked me if I could not flush the mains.

Q. And you would at once do it?

A. Yes, sir.

Cross-examination:

(By Mr. GUERRY:)

Q. Do you spend much time in the engine house where the water is pumped?

A. I did for nine months—8 or 9 months.

Q. Where did you spend the other time?

A. Around on the streets, about in different places. I go down and inspect things occasionally.

Q. When you were there nine months, what were you doing?

A. Helping run the pumps, when we had direct pressure.

Q. As superintendent you don't stay there regularly?

A. No, sir.

Q. You don't stay at the standpipe regularly?

A. No, sir.

Q. You stay about on the streets?

A. Yes, sir.

Q. Engaged in other business?

A. Yes, sir.

Q. You have got other business?

A. Yes, sir.

Q. What is that?

A. Real estate and life insurance.

966 Q. How much of your time do you spend at the waterworks during the day?

A. I don't know.

Q. Do you go there every day?

A. Not every day, no, sir.

Q. You go there how many times a week?

A. May be 2 or 3 times.

Q. How often did you visit the old standpipe?

A. I don't remember. It is not a great ways from my house, 2 or 3 blocks I passed there.

Q. How often did you visit that?

A. I could not tell you how often.

Q. Occasionally?

A. Yes, sir; frequently.

Q. This is operated by other people?

A. Which?

Q. The waterworks?

A. I have an engineer only.

Q. Engineer and who else?

A. No one else.

Q. Did you make it a rule to count the hose on every occasion?

A. Very near every one.

Q. Did you keep a record of it?

A. Yes, sir.

Q. Where is that original record?

A. I have got it here.

Q. I wish you would let me see it?
A. Here is a copy.
Q. That is the original?
A. No, this is a copy.
Q. I asked for the original?
A. The original is in a book there with private letters.

Mr. WIMBERLY: If you will tell us what you want we will give it to you.

WITNESS: This is taken from my original copy.

Q. Independent of the record can you recollect, without reading and refreshing your recollection, independent of the record, can you tell the length of hose at these different fires that you have mentioned?

A. No, sir, I can't remember all that. This copy—these copies are made a few hours after the fires.

Q. The ones you have mentioned?

967 A. Yes, sir; I think so, after refreshing my memory.

Q. Go over the different ones you have mentioned without referring to your paper?

A. The McClellan fire was 650 feet.
Q. From what plug was it?
A. That on the corner of Lee street, near Col. Parks' residence.
Q. What is the plug known as?
A. I don't know about that in particular.
Q. At the Littleton plug?
A. No, sir.
Q. What other one are you talking about?
A. That is the plug going east on Lee street.
Q. What about the Littleton plug?
A. 350 feet.
Q. What is the width of the street there?
A. I think it is about 80 feet. Not sure about that.
Q. You mean to say they had 350 feet of hose to get across a street 80 feet wide?
A. Yes, sir; I say they used that much at that fire.
Q. You counted them on that occasion?
A. Yes, sir.
Q. Measured them?
A. I counted sections of hose, 50 feet to a section.
Q. How many sections were there?
A. Seven.
Q. What was the length of a section?
A. Fifty feet.
Q. Did you measure them?
A. Did not.
Q. It was coiled around every which way.
A. Yes, sir; right smart hose pulled of- there.
Q. Were you there when the hose was attached?

A. Yes, sir.
Q. You said there was some place 150 feet, where was that?
A. No, I did not.
Q. What was it?
A. 250.
Q. Where was that?
A. 350. On the far end of Lee street, coming down to the McClellan fire. There were two lines of that hose there, 350 feet each. The other was 650 around at the corner where Col. Parks lived.
968 Q. All these coming from the same main?
A. Yes, sir.
Q. Which main?
A. Six inch main on Lee street.
Q. Which main was the Littleton plug attached to?
A. Lee street.
Q. The one in front of John Seay's?
A. That's 4th avenue. That is a different fire. Altogether that line of hose was 11 sections. That is what is known as the Lowe fire.
Q. I am talking about the fire that Mr. Seay testified about the plug in front of his house—the McClellan fire?
A. I will explain about that if you will allow me to, I am satisfied I can——
Q. I am not asking you what you are satisfied about: I am talking about the plug in front of Mr. Seay's?
A. The plug that Mr. Seay was talking about was on 4th avenue. That plug was used at the Lowe fire.
Q. I want to get it straight?
A. The fire was on Third avenue and the plug used was on 4th avenue in front of Mr. Seay's house. There were two lines of hose used at that fire.

Mr. WIMBERLY: What fire are you talking about now?
WITNESS: The Lowe fire. Mr. Seay, I am sure, is mistaken.

Q. I didn't ask you whether he was mistaken or not.

Mr. GUERRY: I ask that that be ruled out.
The MASTER: Yes, sir; that is not in response to anything.

Q. How much hose did you say there was altogether, 650, 500 that made 1150 feet?
A. 650 and 700, makes 1350.
Q. Don't you know that is more hose than the reel would carry?
A. No, sir. I don't know how they were there but they were there.
Q. How many reels there?
A. I don't know, sir. I counted the section of hose.
Q. How do you know the spigots ran all night?
A. I saw them.
Q. Saw them all night?

A. No, I saw some of them sometimes.

969 Q. How could you tell they ran all night?

A. By lowering the water in the tank. No other way for its getting out.

Objected to and motion made to rule out by counsel for respondents. Objection overruled.

Q. That's what you mean to say?

A. How is that.

Q. You mean you know they ran all night because the water was lowered?

A. Yes, sir; that's one cause.

Q. What other?

A. You mean the sprinklers?

Q. Spigots?

A. Yes, sir; at different times.

Q. You know they ran all night because the water was lowered in the standpipe?

A. I judge from this they would be running all night, they would be running in the morning. I would get after the different consumers and try to get them to stop in order to keep up the pressure.

Q. How do you know they would run all night?

A. I judged by——

Q. How do you know they were running at night?

A. I could see them.

Q. Did you go from place to place and house to house and see the spigots running?

A. Yes, sir; I have been around several times and see them running and I would get after them about it and when I would see them the next morning they would be running.

Q. And you inferred from that that they ran all night?

A. Yes, sir. Of course I didn't stay and watch them all night.

Q. Whose horse was this that died in the branch?

A. I don't know. It was a negro's, I understand.

Q. Did you know he was there before he died?

A. No, sir.

Q. Do you know how he got there, anything about it?

A. Do not.

Q. How much hose did you have at the bakery fire in '95?

A. I don't remember about that.

970 Q. How much did you have at the national bank fire in '96?

A. Only about two sections, I think.

Q. How much was there at the compress fire in '96?

A. I don't remember about that. The hose was attached on Stonewall street and run across the street—run across to the compress.

Q. How much at the J. H. Crouch fire, March 12, '96? I will state that I am asking you about the fires that you testified about in your affidavit in this case?

The MASTER: Has there been any evidence in this case as to those fires at all?

Mr. WIMBERLY: I hardly think that is admissible.

Q. The oil mill then, what was the length of hose there?

A. Every plug was used there that was in reach of the fire when the fire was going on. I didn't count the sections that night. Really didn't have time to do it. The fire was a very disastrous fire and every plug was used that was near enough to use. The engine was attached to one of the plugs and used.

Q. How much hose was used at this Mercer stable fire where the hose bursted?

The MASTER: Any evidence on that?

Mr. GUERRY: Yes, sir.

WITNESS: I don't remember about that.

Q. How much hose was used at Baldwin & Co. fire, dry kiln?

A. I think there was about 14 sections attached to that plug, is my recollection.

Q. How does the altitude there compare with the altitude at the standpipe?

A. I suppose it is some lower.

Q. Lower than the standpipe?

A. Just a few feet, I suppose.

Q. I believe you stated the length of hose at the Whitehard fire?

A. I think so. There was 650 feet I think on one line,
971 and 600 or 650 on the other and there was about five hundred and something on the other line. I have got a minute of those things, taken down just at the time.

Q. What amount of hose at the Variety Works fire in '97?

A. My recollection is about that fire about 500 or 550 feet.

Q. How much hose at the Parks fire in '98?

A. There were 11 sections attached to the plug on the corner of East Boundary and Crawford street. To that plug 18—yes, 18 sections. There were 11 sections on the plug standing in the corner of 4th avenue and Crawford street, East Boundary, 18 sections.

Re-direct-examination.

(By Mr. WIMBERLY:)

Q. That memorandum that you handed Mr. Guerry, you prepared that when?

A. Today.

Q. After looking through that letter book, to save time?

A. Yes, sir.

Q. Where did you keep that copy?

A. In that book.

Q. Letter book?

A. Yes, sir.

Mr. WIMBERLY: We put in the letter—you promised to let us have the original,—dated January 29th, '95, from the Dawson Waterworks Co. to Baldwin, mayor.

Mr. GUERRY: Al- right, we will consider that in.

PHILADELPHIA, PA., *January* 29, '95.

A. J. Baldwin, Esq., mayor city of Dawson, Dawson, Ga.

DEAR SIR: On the 17th of December, 1894 you wrote us by authority of your city council regarding the making and entering into a new contract for fire protection for your city upon a yearly basis, and at a reduced price per annum, setting forth as your claim
972 the illegality of the contract now in force between the Dawson Waterworks Co. and the City of Dawson, and concluding by stating "If we can not agree, you will please consider this as a notice that this council will not longer be liable under the old contract after January 1st, 1895." It is useless for us to enter into a discussion at this time as to our reasons for not considering your proposition as they are fully known to you; and in replying to you, we can only say that the contract which was entered into between this company and the City of Dawson, was done in good faith and as far as we are concerned was fully and honestly complied with; and that we have ever since fulfilled our part of the agreement in each and every particular; and that we fully believe that our contract with your city is a legal one and that the charge made to your city for hydrant rental is an extremely reasonable one. We are perfectly satisfied with the contract that we have entered into with the City of Dawson; and wish to say here that we shall continue to maintain our fire pressure in future, the same as in the past; and your city fire department will find our fire hydrants ready for service whenever they may be required. In fact, always ready for use. We shall present our bills for hydrant rental to your city when due and shall expect the city to pay same.

Yours truly,

DAWSON WATERWORKS CO.
H. BAYARD HODGE, *Secretary.*

973 JAMES H. DAWES, re-called in rebuttal, by complainants' testified as follows:

(By Mr. WIMBERLY:)

Q. You heard the testimony about the leaking of the old tank?

A. Yes, sir.

Q. Were you at any time in Dawson about May 23, '99, few days after the filing of this present bill?

A. Yes, sir.

Q. Did you see the tank at that time?

A. I invariably on each visit went to the standpipe and went to the top of the tank and examined it; and on that occasion did also.

Q. In view of these affidavits, which you were shown, did you look at it carefully?

A. Yes, sir; I did.

Q. State to the court fully as to the condition of the tank?

A. I examined first the superstructure in order to determine whether the timbers were in good, safe condition. I afterwards went to the top of the tank on a ladder to see the condition of the tank. I found at that time that it was *within three feet of being* full, no indications whatever of leakage. Leakage afterwards did develope within two feet of the top—upper two feet of the tank, was the only leakage shown, with the exception of a small stream that escaped through the bolt holes where the inlet pipe was attached to the bottom of the tank. That didn't exceed over 2000 gallons in 24 hours—very small leak.

Q. You are familiar with estimating flows of water?

A. Yes, sir.

Q. That is your line of business?

A. Yes, sir.

Q. As constructor of waterworks?

A. Yes, sir.

Q. That leakage towards the top, how much would that affect the stand of water in the standpipe.

A. That leakage would not affect the capacity of the standpipe to any great extent.

974 Q. Do you remember the capacity of that particular standpipe?

A. No, sir. The upper portion of the tank would leak, that is within the two feet for a certain length of time and gradually swell up and stop—almost stop.

Q. What was the capacity of the pumps at the waterworks company?

A. One of those pumps, I think had a capacity, it has a fixed limit of speed of 750,000 gallons in 24 hours. The other is 500 gallons in 24 hours, making a total of 1250. That is ordinary speed.

Q. Could be speeded faster than that, if desired?

A. I might state that is 100 feet piston speed per minute.

Q. What is the effect of the leakage on keeping the tank full where you have the engines?

A. Very immaterial up there at that elevation of the tank.

Q. How long was that tank in that condition?

A. I could not say. I presume it had leaked for sometime, more or less, at the upper part of it. It would get dry and the wood there would spring a little naturally. Not serious at all. This was the most serious leakage I have ever seen there.

Q. The one when you were there in May?

A. Yes, sir.

Q That was after the bill was filed and that was brought to your attention?

A. Yes, sir.

Q. Dr. Cheatham went into a conversation that he had with you on the train between Dawson and Albany, will you state what took place in that conversation, what year and month?

A. My recollection is it was in July 1898.

Q. You were down here at that time for what purpose?

A. Here at the trial of one of the Dawson Waterworks' cases.

Q. That was the second trial of the case?

A. Yes, sir.

Q. Relate the conversation?

A. We, of course, held conversation on a great many aspects—the one I presume you refer to——

975 Q. The one he referred to the other day?

A. He stated to me that, that he thought the pressure was not sufficient to comply with the contract. That he believed, from a test that he had seen as he went by, that the stream didn't reach 50 feet vertically. We also discussed the general features of the system. I told him that it would be physically impossible for a stream to fall short of 50 feet, if all the conditions surrounding the plant were in good order; that unless the hydrant was partially open it should have reached 50 feet without any difficulty. Felt satisfied of that, if there was no stoppage in the main due to valve being closed.

Q. He said something about your source of water supply: What was it took place in the conversation relative to the artesian water?

A. The question was incidentally raised by one or the other. I stated to him that it was the expectation of the water company at some time to put in an artesian supply here; and it would be done if it were not for the litigation. When this litigation, which we expected to terminate at any time, was terminated, that we would endeavor to obtain a supply of artesian water. It was a casual conversation. I didn't charge my memory with it to any great extent. Thought it was immaterial at the time.

Q. Had there ever been any complaint to the waterworks company as to the source—something was said about using all the source of supply, resolution that you could use any or all: Suppose you had used the other two springs that you did not use, would that have affected the quantity of water in dry seasons when you really needed it?

A. No, sir, the testimony here is that it goes dry in dry seasons.

Q. At the time you need it would be the time these springs would be dry?

A. Yes, sir; absolutely dry. Would not be of any use.

976 Would not need it at any other time under any circumstances.

Q. Something was said by Mr. Baldwin yesterday about your straightening out or changing the channel, what is the fact about that?

A. When we located on the tract of land that has been adopted as the source of supply, the stream was very circuitious—wound around here and there throughout that bottom and it was with a

view of straightening it out and giving the water free clearance from the upper end of our property to a point where it would leave our property. Made the line straight as possible to avoid running around through boggy land.

Q. Did that change the actual source of supply?

A. No, sir; did not cut out a single spring.

Q. It add any?

A. Didn't add any.

Q. Left it like it would have been?

A. Yes, sir.

Q. Something was said as to their being no sort of protection between the hillside and the stream, is there anything that would catch the surface water?

A. Well, at the time there was a ditch dug on the west side of the stream but just what distance it goes above the inlet pipe I am not prepared to say. The water on the eastern side the entire length of the property that was purchased at that time, is protected by this old water course.

Q. That channel you straightened?

A. Yes, sir. Any wash water that would come from the hillsides on the east, would naturally be diverted when it got to that old channel.

Q. That is the side towards Dawson?

A. Yes, sir. Would not get over into the main supply, though in extremely heave rains the embankments that have been put up from time to time, change the course sometimes—washes away and the water will break in and get into the old channel.

977 Q. I believe you stated on yesterday that your business is the construction of waterworks systems and has been during practically your business life: Are you as a constructor of waterworks systems, familiar with the calculation of the needs of such systems for fire protection—what you may call the law of hydraulics and static pressures of water—loss of water from friction or resistance?

A. I am, yes, sir.

Q. Explain to the court how friction-loss from increased hose—increased length of hose: Have you got a book with you?

A. Yes, sir; I can give it in 2 or 3 ways.

Q. I will let you explain in your own words to save time?

A. In the Dawson system, of course always take into consideration the quantity of water we want to deliver at any given point in order to determine the size of mains we will place for that purpose. We take into consideration the friction-loss over the entire distance when delivering a certain, fixed quantity of water at the terminus. If we wanted to obtain a given static pressure, we would so arrange the mains; but if we tried to draw two or three times the quantity of water at the terminus of the main, more than what was originally intended to be drawn, by reason of additional friction-loss in the

pipe, the head of water at the extreme end would be very much diminished.

Q. Take for instance three hose lines as compared with one, would there be a considerable diminution?

A. Yes, require that the mains would deliver that much greater volume of water the entire distance.

Q. That would increase the friction very much?

A. Increase the friction loss and reduce the head at the terminus of the main. It would give less pressure.

Q. Let's take one line of hose: Suppose you had a pressure at any given point that would throw a stream, through 100 feet of clean hose, fifty feet high, now upon the idea that there was only
978 one stream, no loss from any bad hose, being worn, old or anything of that kind, how much would it throw through 200 feet of hose?

A. I could calculate that for you. It would be rather tiresome to the court.

Q. Didn't you calculate it a few minutes ago?

A. I have calculated it. It would involve a considerable amount of time. I could read these tables and give it to you as accurately and save time.

Q. You have used the table several times in making the calculation for yourself?

A. Yes, sir.

Q. What book is this?

A. That is a standard authority on fire streams, compiled by Geo. A. Ellis, A. P. Leshure, chief engineer. It would require a pressure at the fire hydrant of 29 pounds to throw a stream of water 50 feet vertically in still air, using 100 feet of rubber hose, with one inch nozzle attached. Now if you would add 100 feet to that, making 200 feet in length, you would get but 43 feet elevation of water.

Q. Instead of 50?

A. Yes, sir.

Q. Suppose you added another, making 300 feet?

A. You would have 38 feet.

Q. Suppose you added another hundred, making 400?

A. 33 feet, vertically, sir.

Q. Now that is in addition to the loss you would have from having more than one stream?

A. No, because you had to start with a given plug pressure.

Q. Suppose in addition to having one line of hose, you would have another line on the same main?

A. You would be obliged to calculate the friction loss on the main from the standpipe or tower to the point of delivery.

Q. Would that still further diminish it?

A. It would diminish it, yes, sir.

Q. Suppose any of this hose was old, or leaky or rough,
979 defective in any way, what effect would that have?

A. Would be that much greater loss. Had a leak between

the hydrant and the nozzle, it would diminish the pressure at the nozzle.

Q. Where you have a system calculated for one stream or a stream through a certain length of hose and you want to add—make it to add on other lines, what device do you resort to to keep up the old pressure and prevent loss where it has proper length?

A. As *I under*, if you wish to play a stream of water on a fire a great distance from the fire——

Q. Yes?

A. Generally the plan in all good fire departments, is to lay two lines of hose from one hydrant to a point near the fire, then connect there with a nozzle of some kind, Siamese coupling, or other device to reduce the friction-loss in a long line of hose.

Q. Reduce it in what way?

A. It joints two lines of hose at the extreme end and then apply one short se-tion. The two lines of hose would be joined, with one section or single line of hose with a nozzle attached, which would only deliver one stream on the fire, although the water was conducted there by two lines of hose. That is done, perhaps, where you want to reach the fire at a great distance.

Q. Where lines of hose are used for a great distance, what is to be done in order to produce satisfactory results in the way of supplementing for over-distance, say 300 feet?

A. In *waht* way supplementing?

Q. Supplementing the strength: Suppose you have not got your hydrants close enough together, how could you supplement the strength of them?

A. There would be only one way of supplementing that I know of, that would be by combining these lines of hose. This is the only way you could increase your power.

Q. You think you would have to use the aid of an engine?

A. Yes, sir.

980 Q. State whether or not it is possible to get satisfactory results where lines of hose are used without regard to the construction or capacity of the system that was not built for longer lines or more numerous lines, without regard to the size of the mains?

A. Generally very unsatisfactory.

Q. Did you hear the testimony of Mr. Deubler?

A. Yes, sir.

Q. Did you as an expert examine into the cause of any of these failures that may have happened to put out the fire—to what did you attribute them?

A. I attributed it to the great distance, generally speaking, of the fire from the hydrants; and the evident lack of attention to maintenance of the hose——

Mr. Guerry: I object to that mode of answering.

Witness: I will withdraw that. The long line of hose laid——

Mr. Guerry: I object to his giving his opinion on the result on some investigation he has made——

The MASTER: I understand he is giving his opinion from the evidence he has heard in this case.

WITNESS: I might state this. The location of nearly all these buildings that were burned, I know the location of the hydrants and I know they are a great distance from the burned buildings; and with two or more lines or with even one line of hose laid that long distance to a fire, it would be impossible for them to get a good, strong, high stream of water.

Cross-examination.

(By Mr. GUERRY:)

Q. Take this case—these waterworks, where you had a pressure, in the way the waterworks were constructed, same thing, you had a pressure that would throw water vertically 50 feet in still air, through hose 100 feet long, one inch nozzle, suppose you added 100
981 feet, all the other conditions were the same, what would — the reduction in the height of the water thrown?

A. About seven feet.

Q. Suppose you put it 300?

A. It would be seven to eight feet less than that, sir, in height.

Q. Well, you mean it would be 14 feet less?

A. 14 feet less than 50—be about 35 or 36 feet, probably.

Q. Suppose it was 400?

A. You would not then probably have over 27 or 28 feet or thirty feet. That can be worked out in——

Q. The way this book is estimated was by working the same rule?

A. That book is absolutely correct. It has been tested.

Q. What would be the result now if two streams were used, any reduction?

A. If you could maintain your same pressure, at the hydrant, as compared with one stream, two streams would reach the same elevation, if they had the same length of hose. But if your main was small and your power at the hydrant was reduced by the additional quantity of water passing through, you would still further diminish the elevation of your stream. You take Main street, where there is an eight inch main, you could place three streams of water on that main or four and they would reach practically the same elevation. Three of them would I am quite sure.

Q. What is the size of that main?

A. It is an eight inch main up to Lee street—intersection of Lee street.

Q. That is the main or plug the hose was attached to for the dry kiln fire—Farnum House fire?

A. I presume the hose were attached to a 4, 6 and eight inch mains. There is one there, four inch main, extending on Lee street from Main street, about 300 feet probably west. Then from the

intersection of Lee street and Main, there is a six inch main extends up two squares to a point near the old Methodist church
982 opposite the dry-kiln fire. I presume a fire of that magnitude would have used all those mains.

Q. You take 1600 feet of hose where the pressure is 50 feet through 100 feet of hose, one inch nozzle, how high would it throw it through 1600 feet?

A. Well, it would reach the same elevation 1600 feet away but it would discharge very little more. While you could not throw a vertical stream 50 feet——

Q. How high could you throw it?

A. I guess you could throw it 10 feet high on the same level.

Q. Have you ever seen any practical illustrations of that sort of thing?

A. Not that long line where you had an initial pressure to throw a stream 50 feet vertically through 100 feet of hose with a one inch nozzle. Never seen it tried, no, sir. That would be a very unusual case.

Q. You never have seen such an experiment?

A. No, sir.

Q. Suppose the size of the nozzle is reduced and the other conditions are exactly the same, what would be the effect on the distance the stream would be thrown?

A. If you use a small nozzle your stream cannot be thrown for the reason——

Q. I don't mean where it is very small, take an inch nozzle and reduce to a ⅞ths?

A. The difference in the elevation would not be over two or three feet.

Q. Which would throw the highest?

A. The one inch nozzle would throw it the highest.

Q. Than the smaller one?

A. Yes, sir.

Q. Is it not true and have you not witnessed it, you take a sprinkler arrangement by which you can reduce the opening, can't you throw the water further by making the opening smaller?

A. Oh, yes, sir. Quite a material difference between——

Q. Explain the difference?

983 A. Between a small hose used for sprinkling lawns and a large two and one-half inch hose for fire purposes.

Q. What is the difference?

A. Friction-loss in that small hose is tremendous. Three-quarters of an inch pipe would probably deliver not over 30,000 gallons in 24 hours running full. It requires volume though to reach the greatest distance. You can't get volume with friction-loss in small hose.

Q. Is it not true, if all the other conditions are the same, that a ⅞ths inch nozzle will throw the water—not talking about the quantity, will throw water a greater distance than a one inch nozzle?

A. No, sir.

Q. With the same pressure?

A. I understand.

Q. Same hose?

A. The stream will strip by reason of being smaller, quicker than a larger stream. A larger stream will hold together a greater distance than a smaller one will.

Q. Suppose instead of an one inch nozzle you take a two inch nozzle?

A. A two inch nozzle would be all right if you had a pipe——

Q. (Interrupting.) If you had the same hose and same pressure, a two inch nozzle will throw it higher than a one inch nozzle?

A. No, sir.

Q. Then there are cases where a smaller nozzle will throw it further than a larger nozzle?

A. For the same given quantity of water, a one inch will throw it further than a ⅞ths.

Q. In the case I put first, we have got the same hose but a smaller nozzle, now if you take the same hose, the same pressure—same size hose and use in one instance a one inch nozzle and the other a ⅞ths nozzle?

A. The one inch nozzle, in fact, I know will throw it a little higher, a little better solid stream than a ⅞ths will.

Q. Yet in the other case a two inch nozzle will not throw
984 it as high as a one inch nozzle?

A. No, your hose will not deliver it.

Q. Same hose?

A. Yes, sir. You have got—it would go probably 20 per cent. further.

Q. Take a two inch nozzle with an arrangement so that you can reduce it without any manipulation of the hose at all, so that it can be reduced to a one inch, which would be thrown the furtherest?

A. One inch or two inch?

Q. Yes?

A. Unless you could maintain your pressure at the nozzle, the one inch would be thrown the furtherest, undoubtedly. As I started to say, if you would use a two inch nozzle and maintain the same pressure at the nozzle that you did with the one inch, then you could get a stream much higher with the two inch.

Q. How long before '99 had it been since you had seen this old tank and examined it?

A. I saw it the year before. Just what month I could not say. In July, I think I was here last.

Q. It was torn down when you saw it again?

A. Yes, sir.

Q. Torn down by the company and replaced with the present one?

A. Yes, sir.

Q. You spoke of the non-use of the spring, is it not a fact that

natural springs are made to produce a greater outflow of water by process of development—simple process of development?

A. Well, under certain conditions you could increase some springs to deliver a greater volume of water at a certain point than you could if undeveloped.

Q. Isn't it the common business of people interested in these enterprises to develop a greater supply of water than the natural outcome of springs—in their natural condition or in their found conditions?

A. That would depend altogether on local conditions.

985 Q. Is it not a fact that the water supply of the waterworks company can be protected from surface water by embankments or diverted so that it will go into the stream below instead of above the inlet pipe?

A. If local conditions are satisfactory you could of course. You could build embankments around any source of supply.

Q. Is it not the case of your company here on the east side? Couldn't an embankment be built high enough on the east side of that branch firm enough to convey the washings from the hills on the east side to a point below the mouth of the inlet pipe?

A. I know of no washings——

Q. I am not asking you that——

A. That would depend altogether on the contour of the land there. Now the old channel of the creek there takes a great bit of the washings at that point on the east side.

Q. Where is the channel?

A. On the east side of the line—original channel.

Q. You mean there is a depression—you don't mean to say there is a channel through which water is flowing?

A. That channel is lower——

Q. I am asking about the west side?

A. You said the east side.

Q. I meant the west side?

A. Yes, sir; I presume an embankment could be built for quite a distance up there.

Q. You can build an embankment?

A. As far as you please.

Q. And just as high?

A. Yes, sir.

Q. Couldn't it be built so as to intervene between these settlements and this butcher pen, although that surface water is there that was spoken of this morning, so as to divert the surface water down southward before it reached the branch and before it reached any of these springs, couldn't that be done?

A. Probably could be done.

986 Q. Ain't it a fact that it can be done—is it a question of probability, isn't it a certainty?

A. Could be done, yes, sir.

Q. And in that way these springs and this branch could be protected from this surface water?

A. Could not be protected unless it was an embankment thrown around it entirely—thrown around the entire diameter of that swamp.

Q. If the embankment was carried up high enough to reach a point beyond the furtherest place, it would protect it?

A. It would. We have never had the water complained of at all.

Q. You didn't know it was there?

A. No, sir.

Q. I asked you as an expert whether these things could be done?

A. I must say an embankment could be built there.

Q. Couldn't it also be done by ditching it off before it would reach the springs and branches?

A. It would take very deep ditches,

Q. It could be done?

A. Don't think it could.

Q. By digging ditches?

A. No, sir; I don't think there is sufficient fall.

Q. Can't you make fall sufficient?

A. No sir; you have no outlet.

Q. Water runs down there?

A. Yes, sir; it runs down; but it is not a rapid stream. No great fall in the stream.

Q. Can't you catch it higher up with a deep ditch—or a canal, I will call it, so as to carry it below the mouth of the pipe?

A. Yes, sir, you may be able to do that. I could not state that as a fact without an examination.

Q. How high above the mouth of the inlet pipe is the first spring?

A. I have never measured it, sir, and can't be accurate; but I don't know of any spring coming in probably inside of 100 or 150 feet.

Q. How high is the next one?

A. I could not tell, sir.

Q. What does that 150 feet spring amount to?

987 A. Very little—small spring.

Q. Couldn't your company extend its inlet pipe up to and beyond the place where this water may be contaminated by the surface water and protect it in that way?

A. I don't know how much of the supply would come in below that point that is alleged to be contaminated.

Q Suppose you carried your pipe up higher, it would catch the water before it became contaminated below that point?

A. Yes, sir. The further you go up stream the smaller the quantity of water.

Q. You say that spring is very insignificant?

A. It is a small spring that I speak of.

Q. The next is 300 yards?

A. I could not tell you. Probably the largest spring is the Dunn spring. Other springs coming in here and there.

Q. How high is the Dunn spring?
A. About 1500 feet above the pumping station.
Q. Of course you could carry your inlet pipe, if there was an occasion for it, up to that inlet spring?
A. Yes, but you would have an insufficient supply of water up there.
Q. Isn't there considerable supply up there?
A. Less than 20,000 gallons.
Q. Above that spring, doesn't the branch come up above that?
A. Riese further up the branch. Water up there same as below.
Q. The edge of the hose would make no difference if the conditions are all right?
A. As long as the rubber lining is perfect it would make no difference.

Re-direct-examination.

(By Mr. WIMBERLY:)

Q. When Dr. Cheatham selected that source of supply, were those same houses there?
A. To the best of my knowledge they were there.
988 Q. Has there ever been brought to the attention of the waterworks company, if it be a fact, that there are any changes in the local conditions near that source of supply than from what there was when the city selected it?
A. No, sir.
Q. Has any request been made for any further protection?
A. No, sir.

Mr. GUERRY: I object to this. It is the duty of the water works company to keep it protected or keep this water pure without any notice from anybody.

Q. State whether or not it is known to the city and the authorities here as to where the general offices of the water works company are located and those who control its affairs live?
A. Yes, sir; known to a great many people.
Q. Where is that place?
A. Philadelphia.
Q. How far from here?
A. About 1000 miles.
Q. Has your attention ever been brought by the citizens around here of any desire for any change in the source of supply or the character of the surface?
A. No, sir; none whatever, except that little conversation I had with Dr. Cheatham on the railroad train.
Q. When you were here from time to time making an inspection and learning the wishes of the people, anything of that sort brought to your attention?

A. No, sir. Within the last year probably I heard it among the people assembled in the court room here.

Q. Prior to that time?

A. None whatever.

Q. On the former trials of the waterworks cases against the city, Nov. '96 and July '98, was any such contention made as to the unfitness of the supply, or muddiness of the water?

A. The question was never raised to my knowledge.

Q. You were present in court both of those times?

A. Yes.

Q. And heard the defenses the city set up?

A. Yes, sir.

Q. As a man familiar with waterworks supplies, can you
989 say as a matter of fact whether it is possible for water that has gone through waterworks and gone through a tank and distributed out to its patrons, after it is kept in a pitcher over night, developes different qualities or smell from what it previously possessed?

A. In living waters I never have. Never heard of any such thing in living water.

Q. What do you mean by that?

A. Water taken from a running stream. It will occur in water taken from deep wells.

Q. You mean water taken from the ground where it can't get air?

A. Yes, sir.

Q. You mean by living waters, waters exposed to the atmosphere like running streams and open tanks?

A. Yes, sir.

Q. Something was said about buzzards, I believe, roosting there, when that was brought to your attention what did you do?

A. I immediately wrote our superintendent here to——

Objected to as being in writing.

Q. What instructions did you give, if any?

A. To obtain for me an estimate for covering the standpipe.

Mr. GUERRY: Wasn't that in a letter?

WITNESS: Yes, sir.

Mr. WIMBERLY: I will give you the letter.

Q. How soon was that letter written after you got the notice?

A. It was written the same day I received the notice.

Q. Why is it, after writing that letter, it has not been attended to?

A. I have been waiting for a reply from Mr. Horsley. I might say also that I have had estimates given me by the parties who constructed the tank. It was my intention to have them put a roof on it after they construct a tank in Alabama they are now working on.

Q. What will it cost?

A. About $300. if we use iron and about $200. for wood. It is a very small amount.

Q. Why was it left open?

990 A. Nearly all of the standpipes throughout the country are open. Very few of them are closed, simply because it is considered that the water will remain purer and good longer in an open standpipe than it will in a closed one. The sun light purifies it.

Q. When you left it open did you know of Dawson being buzzard infected?

A. No; had no idea the buzzards would light on it or it would have been closed. Never had any idea of it. It would have added very little to the cost.

Re-cross-examination.

(By Mr. GUERRY:)

Q. You say you have never heard of living water putrefying over night in a vessel so that it would smell bad the next morning?

A. No, sir.

Q. If water should get that way in a night, what would you say about it, whether it was living or dead water or bad or something in it that produced that result?

A. If it should get that way?

Q. Suppose it actually stunk the next morning, what would you say about it?

A. I would want to investigate the premises to see if it was the fault of the water.

Q. Suppose it was water brought from a source in a gentleman's house and put there in a pitcher and the next morning it was discovered that the water stunk?

A. Might absorb impurities in a certain locality; but it is presumed in a gentleman's house ther- would not be any impurities of that kind; but if there were any, it would absorb it to a certain extent.

Q. In what you call living water, if it were impregnated with animal or vegetable matter, wouldn't it soon by odors disclose the existence of such matter in it after standing?

A. If it was badly contaminated it probably would.

Q. If you take living water and place it in a place where

991 it would not absorb impurities, in a little open vessel, and find it the next morning in a state of putrefaction, what conclusion would you draw from that?

A. I could not think of any such condition of affairs, sir.

Q. Suppose it got so offensive—smelled offensively, would you not conclude that the water was impure when it was placed there or that it had elements in it that brought out these odors?

A. If that water was placed in a clean vessel and kept in a perfectly pure atmosphere—clean surroundings, and it had an odor in the morning, I should think there was something the matter with the water.

Q. Atmosphere that would make water smell offensively during a period of 12 hours would have to be pretty bad atmosphere?

A. Yes, sir.

Q. Perhaps smell a little itself, wouldn't it?

A. I should think so.

Q. Where there was nothing of that sort, but the water alone should smell badly, you would attribute it then to what there was in the water?

A. Would probably be no other cause you could attribute to it, everything else being perfect.

Q. Now you say exposure of water to the air and sunlight by having the top open is better for the water?

A. Generally is.

Q. Then if that is true if water is bad to start with, covering it will make it worse, won't it?

A. If it is the same quality of water better not cover it.

Q. If the water is impure in the absence of air and light, won't it become more so?

A. It might to some extent. If I was putting artesian water in a tank, I would recommend that no roof be put on it at all.

Q. Did you have this built and superintend the building of the old one?

A. Yes, sir.

Q. Why did you put a cover on the old one?

992 A. Well, it was among the first that we had ever constructed in this country and didn't know what effect the seasons would have on the water here at that time.

Q. Who built this other one?

A. A firm in New Jersey; but it was contracted for by the waterworks Co. Built it from specifications prepared by the company.

Q. What difference is there in water standing overnight in that tank and drawn out in the morning from the faucet that would make it different in kind from water that had been drawn out of a faucet at night and kept over night in the same pitcher?

A. If the water was the same at the time it was drawn——

Q. If there was such impurity in the water, keeping it over night would make it smell, wouldn't keeping that same water over night in a tank and pipes also smell to the same extent?

A. It would undoubtedly.

(By Mr. GUERRY:)

Q. Is there not an agitation in the tank? Is there not that difference?

A. No agitation in the water in the tank.

Q. When the water is running—being used?

A. Not on the surface. The surface of the water in the tank is perfectly still.

Q. Isn't the water in the tank running water more or less?

A. When they — pumping it is running in and when they are

not pumping it is running out. There is a great deal of water in there that is not in motion a great deal.

Q. It is living water because it is being supplied—running out by the use of the people?

A. Yes, sir.

Q. Or by leaking out, if nothing else?

A. It has but very little current at the base of the standpipe.

993 WALTER LOWE, sworn by the complainant in rebuttal, testified as follows:

(By Mr. WIMBERLY:)

Q. What position did you ever hold with the waterworks company in Dawson?

A. Engineer.

Q. Do you remember what period of time you were engineer for the company?

A. One year.

Q. To refresh your recollection, September 6, '98: During that time did you keep the pressure gauge?

A. Yes, sir.

Q. How often did you read the pressure gauge?

A. All during the day and night.

Q. If the water had dropped down at all would the pressure gauge have shown it?

A. Yes, sir

Q. During that time state whether or not it dropped down, if so, when?

A. Yes, sir; it dropped.

Q. How much?

A. Well, I don't know. I wouldn't let it go over 5 or 6 feet before I would begin to put it back.

Q. Five or six feet from the top?

A. Yes, sir.

Q. Did it ever on any occasion ever go below 5 or 6 feet?

A. During the freeze on Feb'y 12th and 13th, '99.

Q. What sort of a freeze was that? What sort of spell of weather was that?

A. Everything froze. Severe.

Q. Severest you have ever known, was it not?

A. Yes, sir.

Q. Why did it drop down at that time?

A. Pumps froze and I couldn't help it.

Q. Did it get entirely out of the tank?

A. I suppose it did.

Q What did you do as soon as you could thaw out your pumps?

A. I did everything I could. Used a chisel to break the ice out of it and hot water.

Q. How long was it before you chiseled out the ice and got the water back again?

A. About a day, I think.

994 Q. Except that one time, what would you say as to the maintenance of the pressure?

A. I held the pressure up.

Q. Do you remember the time the tank leaked?

A. Yes, sir.

Q. What was the effect of that?

A. Nothing to hurt.

Q. How much did the leakage amount to during 24 hours, do you know?

A. No, sir; have no idea about nothing like that.

Q. When you would go back in the mornings after you would stop the pumps at night and resume pumping, how much would it drop down during the time it was leaking?

A. I don't know.

Q. From all causes how much would it drop down?

A. Five or six feet.

Q. That was the limit, was it?

A. Yes, sir.

Q. How long would you remain each day?

A. Pumped until I got the tank full.

Q. Then what would — do?

A. Quit.

Q. What condition did you keep your engine and boilers?

A. Always ready.

Q. When would you commence pumping back again?

A. Whenever the tank would drop down.

Q. You were watching the gauge all the time?

A. Yes, sir.

Q. The pressure gauge that open where anybody could see it?

A. Yes, sir.

Q. At all times?

A. Yes, sir.

Cross-examination.

(By Mr. GUERRY:)

Q. When was it you say you worked for these people?

A. September 6, '98 to Sept. 6, '99.

Q. Just one year?

A. Yes, sir.

Q. Who else worked there that year?

A. None but myself except Mr. Horsley.

Q. What were your duties?

A. Keep the tank full.

995 Q. Were you the engineer?

A. Yes, sir.

Q. You say the pump froze?
A. Yes, sir.
Q. How come it to freeze?
A. I suppose we had such cold weather.
Q. Did it freeze while you were pumping?
A. No, sir.
Q. What were you doing when it froze?
A. Sleeping, I reckon.
Q. Both of them freeze?
A. Yes, sir. The boiler froze too.
Q. Both froze that night?
A. Yes, sir.
Q. While you were -sleep?
A. Yes, sir.
Q. You went back the next morning and found that both of the pumps were frozen?
A. Yes, sir.
Q. How was the gauge then?
A. Could not tell anything about it.
Q. That froze too?
A. Yes, sir.
Q. Did you have water in the tank when it froze?
A. I could not tell you, sir.
Q. You could not tell?
A. The gauge had gone around.
Q. What do you mean by going around?
A. I guess the ice froze the water—the freeze expanded it—shoved it around.
Q. Straightened it, you mean?
A. No, sir; moved it up higher.
Q. How much did it show?
A. I don't know how much it showed.
Q. Was there any water in the tank?
A. I don't know whether there was or not. Wouldn't suppose there would be on account of the frozen pipes all over town.
Q. So there was no water in the tank?
A. No, sir; I reckon not by the frozen pipes.
Q. It had gotten out?
A. Run from the frozen pipes through the yards and gardens.
Q. The pipes freezing up would keep the water from running out of the tank, wouldn't it?
996 A. They would burst and let the water out.
Q. In its frozen condition it *wan* out of the tank?
A. People opened them up and let them run.
Q. Did you see them?
A. Yes, sir.
Q. Where?
A. Mr. Lowrey's yard.
Q. Wasn't it frozen out there?

A. The next morning it stopped.

Q. The next morning you don't know whether there was any water in the tank or not?

A. No, sir.

Q. You staid there a year?

A. Yes, sir.

Q. And had plenty of water all the time you were there?

A. Yes, sir.

Q. That was from September '98 to September '99?

A. Yes.

Q. Didn't have any trouble that year?

A. No, sir; not to bother the water.

Q. No trouble about furnishing water for sprinklers that year?

A. No, sir.

Q. Did you have any flood that year?

A. I think so.

Q. Isn't it true that it flooded that whole bottom—overflowed there, didn't it?

A. Yes, sir.

Q. Where the branch was?

A. Yes, sir; down at the pumping station it did.

Q. What is the distance from that branch to the foot of the hill on the west side up there at the mouth of the inlet pipe?

A. I don't know, sir.

Q. Fifty feet?

A. More than that.

Q. Sir?

A. I don't know the exact distance.

Q. Fifty feet?

A. More than that.

Q. Seventy five?

A. I reckon 75 yards.

Q. 100 yards you mean out to the foot of the hill that comes down to the bottom from the field there?

A. I didn't understand your question. From the bridge
997 up to where the inlet pipe was?

Q. No. Say this is the branch running down this way, here is the hill side, to the foot of the hill over here, how far is it from that branch to the foot of the hill?

A. No distance at all. It is right at the foot of the hill.

Q. How many yards—as far as from here across the house?

A. Where the road comes down and crosses?

Q. No, not talking about the road: up above the mouth of the inlet pipe: You know where the inlet pipe is?

A. Yes, sir.

Q. That is the place: How far is it from there to the field?

A. It is right on the edge of the field.

Q. How far?

A. No distance at all.

Q. Inch?
A. Yes, it is an inch.
Q. Ain't it a yard?
A. Yes, sir; I reckon it is. It is on the boundary of the field.
Q. Estimate it the best you can—point out some object here, from the branch over in the middle of the bottom to the edge of the field?
A. I reckon it is about 50 feet.

Re-direct examination.

(By Mr. WIMBERLY:)

Q. What was it you said made the gauge turn around?
A. Ice expanded it, I reckon.
Q. What part, the needle?
A. The needle.
Q. What was the condition of the pipe leading from the tank to the gauge, was that frozen?
A. Yes, sir.
Q. With that frozen, the pipe between the tank and the gauge, state whether or not it is possible to know whether there is any pressure in the tank itself or not?
A. No, sir.
Q. How was the pipe running from the main to the gauge?
A. It was bursted.
Q. By the freeze?
A. Yes, sir.
Q. So the gauge couldn't show whether there was any
998 water in the tank or not?
A. No, sir.
Q. Therefore you don't know about that?
A. No, sir.
Q. You mean the small pipe leading to the gauge?
A. Yes, sir.
Q. Little pipe running out to the gauge?
A. Yes, sir.

Mr. WIMBERLY: I will call your attention to the local act, Georgia Laws, 1890 and 1891, volume 2, pages 527 and 528.

Mr. GUERRY: Your honor will take cognizance of the charter of the city in Acts '82 and '83?

The MASTER: All public laws need not be specified. If this is a private act you had better specify it.

Any documentary evidence that you wish to put in later can be introduced on the argument.

In the Circuit Court of the United States for the Western Division of the Northern District of Georgia.

THE COLUMBIA AVENUE SAVING FUND, SAFE DEPOSIT, Title & Trust Co.
vs.
CITY OF DAWSON ET AL. } In Equity.

Upon petition of counsel for complainant for an order directing the taking of testimony on behalf of the complainant in the city of Philadelphia, State of Pennsylvania, for the purpose of examining the books and records of complainant, and of the defendant Dawson Waterworks Co., and of the American Pipe Mfg. Co., all of which are kept in the respective offices and places of business of
999 said companies located in the city of Philadelphia; and for the purpose of more conveniently and satisfactorily taking the oral testimony of the holders of bonds of the Dawson Waterworks Co., and of the officers of complainant as trustee for the bondholders, and the officers of the American Pipe Mfg. Co. and the Dawson Waterworks Co.

And it further appearing that all of the witnesses referred to are residents of the city of Philadelphia and could not, without great inconvenience and detriment attend a hearing elsewhere than in said city of Philadelphia.

It is thereupon ordered, that the master will resume the taking of testimony in this cause, and the hearing of evidence in behalf of the — at the office of the American Pipe Mfg. Co. in the city of Philadelphia, Pa., on the 31st day of March, 1902, at 12 o'clock noon and continue thereafter pursuant to adjournments from day to day, with the examination of such witnesses as may be produced, the testimony of such witnesses to be taken orally, in the presence of counsel for the respective parties.

It is further ordered that the complainant shall within five days file with the master and serve upon defendants' counsel, a list of the names of the witnesses to be examined and the general subject of examination and no witnesses shall be examined whose names are not included in said list, unless for good cause shown.

It is further ordered that the costs of the proceedings of the master under and in pursuance of this order shall in no event or under any circumstances be taxed against the defendants or either of them, at a greater sum than would properly be taxed against them under the rules and practice of this court, if the same evidence had been taken before and by the master from the same witnesses pro-
1000 duced before him in the city of Columbus, Georgia, and without any fees for mileage.

Let counsel for the defendants be served with a copy of this order

with leave to move to vacate or modify the same upon notice to opposing counsel, within five days.

This March 15th, 1902.

(Signed) W. A. WIMBISH,
Master in Chancery.

Fifth day.

Philadelphia, Pa., office of the American Pipe Mfg. Co.

MARCH 31ST, 1902.

Hearing was resumed before Hon. W. A. Wimbish, master, as per order.

J. W. HAWLEY, sworn by the complainants, testified as follows:

(By Mr. WIMBERLY:)

Q. What is your connection with the Dawson waterworks?
A. President.
Q. You have held that office how long?
A. Ever since the organization of the company.
Q. Were you in Dawson any time before the waterworks were constructed?
A. Not before they were constructed.
Q. How many times have you been in Dawson at all?
A. Only once.
Q. What was the date of that visit?
A. 22nd and 23rd of Feb'y, 1892.
Q. Were you, Mr. Keen and Mr. Perot there at the same time?
A. No, sir.
Q. Were you there at the same time with Mr. Perot?
A. No, sir.
Q. Something was testified on a former hearing by Mr. A. J. Carver, as to a conversation had with you and Mr. Perot and Mr. Keen at Dawson, after the beginning of the suit of Carver *vs.* Daw-
1001 son Waterworks Co., which was begun about June 29th, 1894, if I mistake not: State whether you ever had any conversation with Mr. Carver?
A. Not that I recollect. I don't remember the gentleman at all.
Q. What time were you in Dawson?
A. I reached there on the train from Thomasville on the 22nd of February and went back on the 23rd, I see by a memorandum I made at the time.
Q. February of what year?
A. 1892.
Q. Were you there any time after the 29th of June, 1894?
A. Never was there but once.
Q. At the time you were there had there been any question raised

as to the character of the service furnished or water pressure, anything of that sort?

A. No, sir; not to my knowledge.

Q. State whether or not in any conversation with Mr. Carver or conversation at which Mr. Carver was present with any one, the fitness of the water was ever discussed?

A. I don't remember to have met Mr. Carver. I don't remember having a conversation on that subject with any one there.

Q. Up to that time did you ever hear of any complaint as to the quality of the water from any source or anybody?

A. Not that I can recollect of.

Q. Mr. Carver states that he had something like this conversation. I will read it to you and let you state whether any such conversation took place: "Mr. Horsley remarked that water would purify itself every 70 yards, something of that sort." I disputed that and finally Mr. Hawley said it would not do it."

A. I don't remember ever having any such discussion.

Q. If you had had such a conversation would you have remembered it?

A. I reckon I would. I have no knowledge of what length it takes to purify itself.

1002 Q. I mean if you had had any such conversation as that, with reference to the character—complaint of that water, would you have remembered it?

A. Yes, sir. I visited there for the purpose of seeing the operation of the waterworks

Q Did you learn of any dissatisfaction from any source on that visit?

A. Not to my recollection.

Q. I won't go over all these different matters: Now the general management of the Dawson waterworks and the different business transactions, you or Mr. Keen more familiar with them?

A. Mr. Keen.

Cross-examination.

(By Mr. LAING:)

Q. You say you didn't have any conversation with Mr. Carver?

A. Don't remember to have seen him.

Q. You don't remember meeting a gentleman by that name?

A. No, sir.

Q. You may have met him and don't recall it now?

A. Possibly may have but I don't recollect it.

Q. Possibly had a conversation that you do not now recall: It has been a good many years ago?

A. I may have met the gentleman; but I have no recollection of meeting Mr. Carver. I can't call any gentleman that I met.

Q. You could not undertake to remember all the conversations you had?

A. Not all the general conversations, no.
Q. You don't remember any special conversation you had with any one?
A. No, sir.

Re-direct-examination.

(By Mr. WIMBERLY:)

Q. What is your business?
A. President of the First National Bank of Media.
Q. As president of a bank, are you accustomed to familiarizing yourself with faces—remember faces and persons?
1003 A. That has been part of my duty, yes.
Q. You say it might have been a general conversation which you don't remember: If there had been any conversation touching in any way upon the efficiency of the water service, the quantity of that water and the quality of it, would you have remembered that?
A. I think I should.

JOS. F. KEEN, JR., offered by the complainant, testified as follows: after having duly affirmed:

(By Mr. WIMBERLY:)

Q. What is your connection with the American Pipe Mfg. Co.?
A. I am president at the present time.
Q. Prior to the time you were president?
A. I was manager and vice president.
Q. General manager?
A. First general manager, the vice president and general manager and now president.
Q. What is the business of that company?
A. The business of the American Pipe Mfg. Co., is the construction and operation of waterworks.
Q. As constructor of waterworks, will you please explain just exactly how the business is conducted in a general way?
A. You mean financially?
Q. Yes, sir.
A. We make contracts sometimes for bonds; sometimes for part bonds and part cash and sometimes for cash.

Objected to as irrelevant. Objection overruled.

Q. Bringing it to the case of the Dawson Waterworks Co., will you state, going back to the beginning, what was the first connection your company ever had with this waterworks, the matter of the Dawson Waterworks Co.'s contract?
A. The first connection I had with it, was going there with Mr.

Dawes, I think it was in '90, looking over the field to see
1004 whether the town or business was suitable for construction of a waterworks.

Q. At the time you went there, what was your connection, if any, with the water works contract made with R. L. Bennett and associates?

A. We had none at that time.

Q. What was your object in going at that time?

A. Had the franchise offered us.

Q. By who?

A. Mr. R. L. Bennett and his associates, whoever they were. My object in going there was to see whether the town was of sufficient size and prosperous condition enough for the construction of a waterworks.

Q. You did that with a view of deciding whether to buy his franchise or not?

A. Yes, sir.

Q. You say you went in company with who on that visit?

A. Mr. Dawes.

Q. James H. Dawes?

A. Yes, sir.

Q. What was his position with the company?

A. Superintendent of construction.

Q. He is the same gentleman who testified in the case?

A. Yes, sir.

Q. Now locate as accurately as you can at this time about the date of the visit of Mr. Dawes and yourself?

A. I have nothing to refresh my mind as to the date. It was in '90; but I could not tell exactly.

Q. That is definite enough: The first visit was during 1890, the first half or the last half of the year, as well as you remember?

A. Now Mr. Wimberly——

Q. That is immaterial?

A. I could not tell you.

Q. It was prior to the time your company bought it and constructed the waterworks?

A. Yes, sir.

Q. That is definite enough: What took place on that visit?

A. As near as I can recollect, we examined the town and
1005 went around. We were introduced to a number of gentlemen there and discussed the feasibility and made up our minds that the town was sufficiently large to warrant the waterworks being built.

Q. At that visit will you state whether or not you found any opposition to the——

A. None whatever. All seemed anxious that there should be waterworks built.

Q. After you made up your minds on that visit, what did you do when you got back to Philadelphia?

A. When we came back it was necessary to have a trustee for the issue.

Q. What did you do with the Bennett contract after you came back, did you acquire that?

A. It was submitted to us and the company acted upon it and we bought it.

Q. Purchased it?

A. Yes, sir. There was an assignment of that. We purchased the contract—had the contract with the city of Dawson assigned to us.

Q. You need not go into the contents of that: What did you do then?

A. Then we proceeded to get a bond trustee.

Q. Explain about that?

A. That is done, you first have an appointment of a trustee, as we would not undertake the construction of any waterworks unless we first advised with a suitable trust company; and in this particular case we invited the trustee afterwards to go down and examine—look into the works, in order that the trustee be satisfied that all legal points were all properly guarded; the people in the town were anxious for waterworks; and we applied to the Columbia Avenue Co. to act for us as trustee under the mortgage.

Q. With what money was the waterworks to be built—how was the money to be raised?

A. From the disposal of bonds.

Q. These bonds that are described in the mortgage—I won't ask you to go into these matters, that was a $40,000. issue of bonds: Under the arrangement who became the owners first of those

1006 bonds?

A. Well, they were paid to the American Pipe Mfg. Co. for construction.

Q. Paid by who?

A. Paid by the Dawson Waterworks Co.

Q. For the construction of the plant?

A. Yes, sir.

Q. Who constructed the plant then?

A. The American Pipe Mfg. Co. constructed the plant under the contract which they had with the Dawson Waterworks Co. I was going to say, the financial matters I am not as familiar with as I am with the construction.

Q. State whether or not the bonds were turned over to the American Pipe Mfg. Co.?

A. To the best of my belief the bonds were turned over to the American Pipe Mfg. Co.

Q. Does the company own those bonds now?

A. No, sir.

Q. What has become of them?

A. The bonds are sold—were sold.

Q. Sold to different parties?

A. Yes, sir.

Q. Going back to Dawson, what took place at Dawson: You made a trip there in '90 and you afterwards made another trip?

A. Made one there in '91 with Mr. Perot, who was at that time associated with our company.

Q. Is he connected with your company now?

A. No, sir.

Q. What took place on that visit?

A. Nothing special took place on that visit.

Q. What office did he hold with your company?

A. Vice president at that time.

Q. What office did he hold?

A. Treasurer.

Q. Well, did you take the matter up——

A. Took the matter up and went over the town, looked at it and concurred in the view of Mr. Dawes and myself.

Q. What citizens did you see on that visit?

A. Could not tell you.

Q. Don't mean by name: Did you see different citizens?

1007 A. Quite a number. Could not tell you the names of them, except we met the mayor, Mr. Cheatham. Met him afterwards here in the office. It was a hurried visit we paid.

Q. At that visit did you learn of any opposition?

A. No. Practically met with a different reception than what we expected. They were very anxious for the waterworks, everybody we talked to seemed to be inclined to give us every opportunity to do the work.

Q. As a result of these visits and learning the situation,—after talking with these people, what did you do?

A. We concluded that it was a safe operation to go into; and we invited the president of the Columbia Avenue Co. to go down and investigate the matter.

Q. Mr. Cuming?

A. Mr. Cuming, the president of the company. Thought it was better that he should get his own knowledge from a visit to Dawson than from anything we told him.

Q. Will you state about the source of supply, what was done with reference to the source of supply of the water?

A. Near as I can recollect, we were required that the water from the different sources of supply should be analyzed, as I recollect; and the present source of supply was analyzed by a chemist. It was fixed as a source of supply and there was afterwards an act passed——

Q. That is in evidence, you need not go into that?

A. We were restricted to that source of supply. That is the source of supply picked out for us. We went around and went below the creek and found at one place, my recollection is, there was a field where there was a great many cattle slaughtered; and went further down and crossed a creek where there was a bridge—went to dif-

ferent places; and from what we could see from the character of this water supply——

1008 Q. Who finally selected it?

A. As I understand, the town selected the source of supply.

Q. Did the Dawson Waterworks Co., have anything to do with selecting it?

A. No, sir; that was fixed.

Q. Do you hold any office in connection with the Dawson Waterworks Co.?

A. Yes, sir.

Q. Since the organization of the company?

A. I think I have been manager ever since.

Q. State whether or not you would have undertaken the matter unless you had been satisfied with the source of supply?

A. Absolutely no. That I can state without any question; and the good will, as I found there, of the people, their anxiety for waterworks, and believing that we had an ordinance that was legal and that the water supply was fixed; that they never would make any contention as that, were the main reasons why we constructed the works.

Q. Relying on that contract, what did you do?

A. Built the works.

Q. Who advanced the money to build the works?

A. The American Pipe Mfg. Co.

Q. How did you expect to get the money back at the time you advanced it?

A. Bonds.

Q. Market the bonds?

A. Marketing the bonds.

Q. But for the faith of the contract you speak of, state whether or not you would have accepted these bonds or advanced that money?

A. No, sir, would not.

Q. You spoke of getting the Columbia Avenue Co. to act as trustee, just explain in a general way how it is necessary—generally do you select a trustee when you have bonds to market—what do you select a trustee for—what does the selection of a trustee mean?

A. All mortgages must have a trustee.

1009 Q. The bonds are issued by the trustee under the mortgage?

A. We are bound to select one.

Q. A trustee for that contract?

A. No, sir.

Q. What kind of a trust company?

A. Get the very best we can.

Q. A trust company of reputable character and standing?

A. Yes, sir. Of course some trust companies are larger enterprises than others. Our aim is to get a trust company that will give character to the business that is done with them.

Q. What was the character of the Columbia Avenue Co.—standing, etc.

Objected to as being irrelevant.

The MASTER: I don't think that is relevant in that form.

Q. State why it was you selected the Columbia Avenue Co.?

A. Because we had every confidence in them.

Q. You spoke of Mr. Cuming going down there, as a result of that visit, what did his company do?

A. *Acted as trustee under the mortgage.*

Q. Are any of these bonds held now by the American Pipe Mfg. Co.?

A. No, sir.

Q. Or by the Dawson Waterworks Company?

A. No, sir.

Q. As far as you know are they held by any of the officers of the company?

A. Not that I know of.

Q. Now Mr. Keen, after this litigation began—not speaking of the present case, but former litigation, between the Dawson Waterworks Company and the City of Dawson—I refer more particularly to the suit first by A. J. Carver against the Dawson Waterworks Co., and others later—suit brought by the Dawson Waterworks Co. vs. City of Dawson for the collection of hydrant rentals for the year 1895, while these suits were pending, what source of revenue had the Dawson Water Company, out of which to pay the interest on these bonds?

1010 A. After the operating expenses were charged up against the income from the private consumers, they had very little, if any. That is a financial matter——

Q. Did the company pay this interest that was paid?

A. The American Pipe Mfg. Co. advanced it.

Q. Will you explain why it was the American Pipe Mfg. Co. advanced that money?

A. We advanced the money from the fact that we believed eventually we would win the suit; and that it was necessary to advance the money in order that the Dawson Waterworks Co. pay its interest on its bonds.

Q. State what interest the American Pipe Mfg. Co. has in seeing that the interest is paid on the bonds?

A. We always take care of the interest on the bonds. Do that so that——

Objected to as irrelevant and objection overruled.

Q. State what business reason you have for paying the interest on the bonds?

A. The best reason in the world. If the company should default in interest, the trustee would foreclose under the mortgage in behalf of the bondholders; and as a company would lose our reputation.

Q. Explain what you mean by losing your reputation—how it affects you?

The MASTER: I don't think that is relevant.

Q. I will ask you this question: In your business as a constructor of waterworks, have you an occasion to market and sell bonds?
A. Yes, sir.
Q. To what extent?

Objected to as irrelevant. Objection overruled.

Q. When was it you ceased furnishing the money with which to pay this interest?
A. When we understood that the court reversed the decision under which we had been acting.
Q. Give definitely the date: Was it the decision in March 1011 '99—in the old Dawson Waterworks Co. case against the city?
A. Yes, sir. When we received advices that the decision was against us, we concluded we would not advance any more money.
Q. Up to that time state whether the bondholders or the trustee the Columbia Avenue Co., had any knowledge as to the source from which that interest money came?
A. No, don't think they did.
Q. Had you ever told them?
A. No, sir; had not.
Q. Did your company ever advise them?
A. No, sir; not to my knowledge.
Q. Did you ever advise them as to the law suit in the State court?
A. No, sir.
Q. When was it you felt it your duty to advise them in the matter?
A. After that case was decided against us.
Q. Why did you advise them then?
A. Simply because we thought that we had advanced all the money, under the circumstances, that was prudent to do; and that they should come in and protect the bondholders. Had no interest in the bonds and they did as trustee.
Q. When you ceased furnishing the money, state whether the Dawson waterworks had any money any longer with which to pay?
A. Not to my knowledge.
Q. As its general manager?
A. No, sir.
Q. At the time you advanced these interest payments, I will get you to state if you expected ultimately to get them back?
A. We did.
Q. Why did you withhold the facts from the bondholders as to there being litigation down in the State court?

A. We didn't think it was business. We expected to collect the money. Not business to let them know there was any trouble.

Q. Didn't expect any trouble?

A. No.

Q. After the adverse decision what did you then believe
1012 was your duty to the trustee——

Objected to and objection sustained.

Q. Has the Columbia Avenue, Saving Fund, Safe Deposit, Title and Trust Co. any connection or stockholder or interested in the American Pipe Mfg. Co.?

A. No, sir.

Q. Or any connection with the management of the Dawson Waterworks Co.?

A. No, sir.

Q. Own any stock in the company?

A. I could not tell you. I never looked at the stock records, you know.

Q. As general manager of the company, what complaint was ever brought home to you or to the company, as to the character of the service?

A. I don't think I ever heard any at all until this suit was started.

Q. Or as to the character or quality of the water?

A. Never heard of it until the suit was brought.

Q. Had there ever been any complaint before, prior to the litigation?

A. Not that I know of.

Q. What is the policy of the company where complaints are made?

A. Generally try to correct them at once.

Objected to as irrelevant.

Q. What would you have done if any complaint had been made?

Objected to and objection sustained.

Cross-examination.

(By Mr. LAING:)

Q. You say you are an officer of the American Pipe Mfg. Co.?

A. Yes, sir.

Q. Also general manager of the Dawson Waterworks Co.?

A. Yes, sir.

Q. You went to Dawson in person then as an officer of both of these companies—I believe the Dawson Waterworks Co. was organized after that?

1013 A. I went there in the official capacity of the American Pipe Mfg. Co., when I first went there.

Q. You don't remember any particular persons that you had con-

versations with in regard to waterworks construction except the mayor?

A. No; there were other gentlemen that we met at the time but I could not recall their names at all, when I first went there.

Q. Just private conversations you had with them?

A. Yes.

Q. No other kind of expressions were had except that?

A. No, sir; not that I can recollect.

Q. When were the bonds sold by the American Pipe Mfg. Co.?

A. Our books will show the date of that.

Q. You don't remember?

A. No, sir.

Q. You say you hold none here now?

A. No, sir.

Q. You got all the bonds for the construction of the company, $38,000?

A. Yes, sir, the American Pipe Mfg. Co. did.

Q. And a majority of the stock?

A. Yes, sir.

Q. The American Pipe Mfg. Co. hold a majority of the stock of the Dawson Waterworks Co.?

A. Yes, sir.

Q. Did the American Pipe Mfg. Co. guarantee in any way th payment of those bonds?

A. Not that I know of.

Q. You can't state when those bonds were disposed of by the American Pipe Mfg. Co. or the Dawson Waterworks Co.?

A. I could not off-hand. I can get the books and find the entries and prove it that way.

Q. You sold the Columbia Avenue Trust Co. a large number of those bonds, didn't you, some $10,000 of them?

A. I think there was $10,000.

Q. And some of the officers of the American Pipe Mfg. Co. bought some of them?

A. I don't know that they bought any. That is a financial matter and I——

Q. You can't state who they were sold to?

A. No, I cannot state positively anything about the bonds.

1014 Q. Is the Dawson Waterworks Co. insolvent but for this contract?

A. I believe it would be except for the contract.

Q. Now you say you paid the interest on the bonds so that the mortgage would not be foreclosed: Has the mortgage been foreclosed since you ceased the payment of interest on the bonds, in '99?

A. I don't know anything about it, sir.

Q. There has been no foreclosure?

A. Not that I know of.

Q. You don't know of any understanding between the American

Pipe Mfg. Co. that these bonds are to be paid—they guarantee the payment of them in any way?

A. No, sir.

Q. They have not foreclosed the mortgage?

A. I don't know. The president of the trust Co. can answer that.

Q. Now the Dawson Waterworks Co collected or attempted to collect the rentals from the water contract until after that decision by the Georgia supreme court, didn't they?

A. Yes, sir; I believe so.

Q. And continued to collect?

A. Attempted to collect, I understood.

Q. You never assigned the right?

A. I thought you said attempted.

Q. You never assigned the right to the trust company that you spoke of—you didn't ask the trust company to collect it in any way?

A. I am the manager and not the executive office, you understand.

Q. You know nothing of these financial matters?

A. No, sir; simply manager.

1015 J. K. CUMING, sworn by the complainant, testified as follows:

(By Mr. WIMBERLY:)

Q. Do you live here in Philadelphia?

A. Yes, sir.

Q. What is your connection with the complainant company, The Columbia Avenue Saving Fund, etc. Co.?

A. I am president of the company.

Q. You have been president of the company how long?

A. 15 years. Since its organization.

Q. As president of the company are you acquainted with the different facts constituting its connection with the office and duty of trustee for the bondholders of the Dawson Waterworks Co.?

A. Duties of it?

Q. Duties—what has been done, I mean?

A. Yes, sir.

Q. That is within your knowledge?

A. Yes, sir.

Q. You are the one that has charge of it?

A. Yes, sir; as far as the duties of the president are concerned.

Q. In connection with the trustee. Going back to the beginning, Mr. Cuming, just state how your company came to act as trustee in the matter and what you did?

A. The American Pipe Mfg. Co. informed us that they were negotiating for the construction of a waterworks in Dawson, Ga.; and asked me, as president of the company, whether our company would

be willing to act as trustee in case they did so. I always make it a rule in cases of this kind to make an examination for myself, so as to judge whether it was a reputable, proper and good business transaction.

Objected to as irrelevant and objection overruled.

WITNESS: On the strength of that I went to Dawson, Ga., arrived there about 4 o'clock in the morning, that is my recollection, and went to bed. Mr. Dawes was there and he informed the offi-
1016 cials, the mayor and them, that I was coming down there to look over the ground. I got up at nine o'clock and had my breakfast at ten o'clock in the morning. The mayor and members of the city council came there in carriages. I got in the carriage with the mayor. We drove all over the town. They seemed to be very much pleased—I don't want to be profuse—but they appeared to be very much pleased with the idea of getting a system of waterworks—supply of water. The town appeared to be large enough to support a waterworks, costing not more than the amount that was estimated for their construction. I went and looked at the source of supply. Of course I knew nothing about that water, whether it was good or bad or indifferent water. Said there was water enough. I had a very pleasant visit and interview with the people. Think they had four carriages. I came away satisfied that everything was legal and right; and that it was a good business transaction to construct the waterworks in Dawson. After getting back here—this was in August '91. I don't remember the date exactly, but know it was the month of August. After getting back here I consulted with my board of directors and we concluded that it was a reputable and a safe business transaction and one that the company could afford to take charge of it or recommend the bonds. That was the main object. On the first of September, '91, we accepted the trusteeship and became trustees under this mortgage.

Q. You speak of your visit down there, did you find any opposition then?

A. Quite to the reverse. If there was any opposition I didn't come in contact with it.

Q. State whether as trustee for the bondholders your company relied upon the contract between the Dawson Waterworks Co. and the City of Dawson?

A. I did—we did—the company did.

Q. State what your company looked to as the source of in-
1017 terest to pay these bonds?

A. Interest on the $40,000 bonds would be $2400 a year. The City of Dawson agreed to pay $2000 yearly hydrant rental. That would come within $400 of paying the interest and from the population and from my interview with them, it struck me that there would not be any difficulty in raising sufficient money to pay the difference; that the revenues would pay the difference and run the works without any trouble.

Q. Did that hydrant rental from the city of Dawson, $2000, figure in determining the ability of the company to pay interest on those bonds?

A. Certainly; we considered that as the starting point, almost sufficient to pay the interest on the bonds.

Q. You spoke of agreeing te act as trustee, will you please explain why it is you, as trustee, use care always in deciding what you let go over your counter?

Objected to as irrelevant. Objection overruled.

Q. State why it is you exercise care?

A. The trust company accepted the trusteeship with the feeling that it was a good safe, business transaction and that they could recommend the bonds to their friends and customers, if they came to us, which they usually do to the trustee, to inquire about them. That was the reason; and for that reason I went to Dawson and looked over the ground and came to the conclusion that the bonds would be a good, safe investment.

Q. If you had known, the institution, I mean by you, your company, wherever I use the word you, of the opposition or question as to the validity of the contract, state whether or not your company would have acted as trustee?

Objected to.

Mr. LAING: Let him state the facts.

The MASTER: It explains conduct.

1018 WITNESS: I will say most emphatically we would have had nothing to do with it.

Q. Can you state anything further that will show the faith your company had in the validity of this contract—the general situation?

A. Nothing more than we purchased, the company I represent, $10,000. worth of these bonds, 25 per cent. of them, for cash, as an investment.

Q. You mean the Columbia Avenue Company?

A. Yes, sir; purchased $10,000 worth of these bonds as an investment.

Q. Who owns those bonds now?

A. The Columbia Avenue Saving Fund.

Q. Owned them ever since they were first purchased?

A. Yes, sir.

Q. Do you remember, without giving the exact figures of each of the different purchases, about what those bonds sold for?

A. They sold from 92½ to 95 cents. 92½ is what we paid for ours.

Q. You paid $92.50 on each hundred?

A. Yes, sir.

Q. 92½ per cent. of the face value of the bonds?

A. Yes, sir.

Q. For that character of securities, or kind and character of se-

curity—that line of southern securities at that time, what would you say as to that price?

Objected to his stating southern securities as being irrelevant.

Q. Or any security?

A. I will say that we have bought Pennsylvania Water Company's bonds—bought $85,000 *Westmoreland Water Company's* bonds at 90—about the usual price, from 90.

Q. From 90 to how much?

A. About 90 to 92½ for industrial—what we call industrial bonds, where they are put out in that way. I consider 92½ a good, fair price.

1019 Q. Explain what you mean by industrial bonds?

The MASTER: I understand that.

Q. State what knowledge the trustee had of any contest that the city may have made as to this contract or any litigation the city had over the contract, prior, say, March '99?

A. The trust company really had no knowledge.

Q. What knowledge had you as president?

A. I heard that there was some contest between the City of Dawson and the Dawson Waterworks Co. in regard to the collection of a tax.

Q. What tax?

A. Tax they levied, I suppose—I don't know anything about the taxes. My understanding was that they were trying to collect taxes there on the property of the Dawson Waterworks Co., which under their contract was to be paid for by a certain supply of water. More than that I knew nothing about it. The interest was paid promptly at the time and we paid it to the bondholders.

Q. Had you any knowledge up to March '99, but what the city had been paying this hydrant rental year by year?

A. Did not.

Q. When I say you I mean your company?

A. Certainly.

Q. Have any such knowledge?

A. No, sir. It would have come to my knowledge as president.

Q. Had the Columbia Avenue Saving Fund, etc., as trustee, any knowledge prior to March '99, but what the city was paying these rentals year by year?

A. No, not to my recollection.

Q. Did your company have any knowledge prior to March '99, that the city was questioning the validity of that contract?

A. Had not.

Q. Had your company prior to March '99 heard of any complaint as to the service down there, or the character of the service, pressure, quality of the water or anything of that kind?

1020 A. I will cover that answer, if it is proper to do so, by saying, we knew nothing about it. The interest was paid

promptly and regularly and we supposed that everything was going along as it should. Knew nothing about it.

Q. That is sufficient: About March '99, what transpired—what was brought to your knowledge?

A. Sometime in March '99 we were notified by the American—that the Dawson Waterworks Company had been borrowing money to pay the interest from the American Pipe Mfg. Co.; and that the American Pipe Mfg. Co., by resolution, declined to advance any more money, unless steps were taken by the trust company for the collection of the revenue that was unpaid by the city.

Q. Was that the first time you knew of anything of that sort?

A. Yes, sir.

Q. Have you the books showing the resolution of your company with you?

A. No, sir. In fact I do not know that we have any resolution. In the course of my connection with the company, I will say that I have brought numbers of suits of different kinds, of course always with the cognizance and knowledge of my board of directors, and I don't think I have had a resolution passed authorizing me to bring suit. I think that is within the province of my duties.

Q. When was it you first learned of any decision of the State court in any waterworks litigation?

A. After I learned that they were contesting the payment and this condition of things, I began to inquire into it and then I learned a great deal that I didn't learn before.

Q. That was subsequent to what date?

A. In March.

Q. Of what year?

A. '99.

Q. At the time the interest was paid, where did your company believe the interest was coming from—from what source, the interest on the bonds?

Objected to as irrelevant and objection sustained.

1021 Q. Coming down to the time since the suit, do you remember the amendment that was filed to the bill?

A. Yes, sir; I saw a copy of it.

Q. Prior to the date of that amendment—about that time, what knowledge did you have of any complaint as to the character of the service, pressure, etc.?

A. Had no knowledge of it at that time or any other time.

Q. What complaint was ever brought to the trust company—your company, by the City of Dawson, of any of these complaints as to the quality of the water, character of the service, or anything connected with it?

A. None whatever.

Q. The different bondholders that are mentioned in your affidavit—I will get you to refresh your recollection by looking at the original record at the foot of that page, which gives the names of those

referred to in your affidavit: You remember making in the case sometime back: I will ask you where these bondholders live and whether you are acquainted with them?

A. Not all of them, no. J. W. Hawley, I know. Isaac L. Miller. I don't know Thomas H. Hall; Thomas C. Else, Philadelphia; F. M. & H. Brooks, Philadelphia; W. H. Miller. I don't know him. The Columbia Avenue Saving Fund——

Q. All of Philadelphia except those you don't know?

A. I think so; but I don't know.

Q. I will ask you when you accepted the trusteeship to whom did you first turn over the bonds?

A. To the American Pipe Mfg. Co.

Q. Have you the order that was made on your company to turn them over?

A. I think I have. I can give you the residence of all the bondholders that are registered. Here is the order, dated October 6, '99.

Please deliver to the American Pipe Mfg. Co., $40,000. of first mortgage bonds of this company. Bonds Nos. 1 to 80 inclusive, in full payment of the contract.

1022 DAWSON WATERWORKS COMPANY.
J. W. HAWLEY, *President.*

Q. Is that the original letter?

A. Yes, sir.

Q. You spoke of the bonds that were registered, have you the book in which they are registered, as far as they have registered?

A. You understand these are coupon bonds and a good many people do not register them. Sometimes they are transferred by power of attorney and go from hand to hand without any registration; so I would not like to say that these are the present holders.

Q. The present holders so far as you know now?

A. Yes, by this registration.

Q. Have you some of the original bonds with you?

A. Yes, sir, I have $10,000.

Q. Who owns those 20 bonds?

A. The Columbia Avenue Saving Fund.

Q. The 20 that you spoke of your company buying?

A. Yes.

Q. I suppose all the bonds are of the same form except the numbers?

A. Just exactly.

Q. I believe the registration book shows the residences of the holders who have registered?

A. I think so, in nearly every case.

Q. I will ask you for what purpose the plaintiff, The Columbia Avenue Saving Fund, etc. Co. brought and is prosecuting the present suit?

A. Well, sir, simply in the interest of the bondholders.

Cross-examination.

(By Mr. LAING:)

Q. Mr. Cuming, you stated that you relied on this contract with the Dawson Waterworks Co. with the City of Dawson and that figures in the transaction of your handling these bonds, that was not the only consideration that entered into it, was it?

A. Only consideration for what, sir?

1023 Q. For your coming to the conclusion that it would be a safe investment for the bondholders and your advice to them that it would be a safe investment—you didn't rely solely upon that?

A. I relied entirely upon the information I obtained there from the contract that was made with the city of Dawson and the election held, what I believed to be a good and valid contract. I relied on that and on the——

Q. That was not my question; did you employ counsel to look into that contract?

A. I did not.

Q. You had no attorney either here or there to look into the validity of the contract?

A. No.

Q. Then without any further investigation than that you advised the purchasers of these bonds, on that kind of security alone, it would be a safe investment, did you?

A. I did.

Q. Was there any other consideration that entered into your opinion about it?

A. What do you mean, pecuniary consideration you mean?

Q. I mean as to the parties from whom the bonds came—through the American Pipe Mfg. Co.?

A. The American Pipe Mfg. Co. I considered a good and reputable company. Thought they were going on to build these works.

Q. Mr. Hawley was president of the American Pipe Mfg. Co. at that time?

A. He was.

Q. And was the president of the Dawson Waterworks Co. too?

A. Not that I know of.

Q. He signed these bonds as president of the American Pipe Mfg. Co.?

A. He might have been, I don't know about that.

Q. President of the Dawson Waterworks Co., I should have said?

—. ——.

Q. You know that he was president of the American Pipe Mfg. Co.?

A. Yes, sir.

Q. Wasn't it on account of your faith and the knowledge

1024 of the stability of the American Pipe Mfg. Co. one of the principal grounds upon which you thought these bonds would be a safe security?

A. I will answer you yes, to a certain extent I knew that the American Pipe Mfg. Co. were engaged in this business. They were careful, reputable people; and I took it for granted that they had gone over this contract, coupled with the information I obtained there and from the tenor of the contract, I believed it was a good and perfectly safe investment for the reasons I have stated.

Q. And the further fact that the American Pipe Mfg. Co. were behind this contract?

A. I considered that the Dawson Waterworks Company had a good contract and one that would be carried out.

Q. You failed to catch my point: Isn't it true that you took into consideration the fact that the American Pipe Mfg. Co. were behind this contract as between you and the bondholders?

A. I don't know anything about it. I don't know.

Q. You don't know?

A. No, I do not.

Q. I will ask you this question: Haven't they entered into any sort of obligation to protect these bonds with the present company?

A. If they have, sir, I don't know it. Positively no, with me or the company or any one that I know of. Positively no.

Q. You don't consider them bound by any sort of contract to stand behind these bonds?

A. I do not. The bondholders have no more claim, so far as my knowledge goes, and we hold 25 per cent. of them, have no more claim on them than we have on the man in the moon—on the American Pipe Mfg. Co.

Q. Have no claim on the American Pipe Mfg. Co. or the Dawson Waterworks Co. outside of this contract with the city of Dawson?

A. Outside of this contract? No.

Q. You say you made no investigation by attorney to see
1025 whether this contract was valid or not?

A. Whether I submitted the matter or the contract to our attorney or not, I am sure I cannot say.

Q. That was not very careful business manner?

A. Possibly not. This is the first time I have ever had any difficulty, and I have had a great many of these matters before me.

Q. You say the American Pipe Mfg. Co. had been paying the interest on these bonds up until March '99, termination of this suit, without your knowledge. You had not made any investigation to ascertain where the money was coming from?

A. The Dawson Waterworks Company paid the Columbia Avenue Saving Fund Trust Co. the interest on the bonds as it matured. Deposited there for payment to the bondholders.

Q. Yet you made no investigation to see whether the Dawson Waterworks Co. were carrying out their contract?

A. Why should I, I ask you?

Q. You had the right to collect direct from the city of Dawson?

A. That's true.

Q. You didn't consider it the business of the Dawson Waterworks Co. or the American Pipe Mfg. Co. responsible at all, did you?

A. I considered that it was the business of the Dawson Waterworks Co. to collect and pay the interest and they did so.

Q. Took it for granted that the city of Dawson was carrying out their contract with the Dawson Waterworks Co.?

A. Yes. sir.

Q. You never inquired afterwards as to whether they were carrying it out or not?

A. I took it for granted that they were or the trustee would have been informed.

Q. You didn't make any investigation, you answered?

A. Did not.

Q. You had notice, you say, about some litigation about
1026 some tax matter?

A. Yes, sir; I heard of that.

Q. Did you investigate to see what kind of litigation that was?

A. Did not.

Q. Now after you were informed by the American Pipe Mfg. Co. that they would not pay any further interest, unless steps were taken—that they would advance no more money unless steps were taken to collect from the city of Dawson: What do you mean—what steps do you mean by that answer?

A. I was not informed by the American Pipe Mfg. Co. The American Pipe Mfg. Co. informed the Dawson Waterworks Co. by resolution that they would advance no more money to the Dawson Waterworks Co. and they notified the Columbia Avenue Trust Co.; and that was the first knowledge I had that the American Pipe Mfg. Co. had been advancing money with which to pay the coupon interest.

Q. You didn't understand my question: You stated in your direct examination to Mr. Wimberly, that the American Pipe Mfg. Co. refused to advance any more money to pay interest, unless steps were taken for some purpose to collect or protect the bondholders—I believe that was your answer, wasn't it?

A. Shall I read you the two resolutions?

Q. No, I don't care to go into that now. They informed you that they would advance no more money unless steps were taken——

A. My information came with a copy of a resolution passed by the American Pipe Mfg. Co. and sent to the Dawson Waterworks Co. and by the Dawson Waterworks Co. sent to me.

Q. You say you have that resolution there?

A. I have a copy of it.

Q. This is the resolution you refer to (referring to resolution)?

A. Yes, sir.

Q. That is the resolution passed by the American Pipe Mfg. Co. while Mr. J. W. Hawley was president?

A. I don't know whether Mr. Hawley was president at that
1027 time or not.

Q. Your company took steps to carry out that resolution, did they?

A. Yes, sir.

Q. They continued to pay the interest after you took the steps?

A. The interest was paid to March—up to and including March '99, I think. I have a memorandum here that I made—interest was paid by the Dawson Waterworks Co. up to March 1, 1899. After that date—since that date the coupons have been purchased by the American Pipe Mfg. Co. and delivered to said company uncancelled.

Q. So far as the bondholders are concerned they have been paid?

A. Yes, sir.

Q. By the American Pipe Mfg. Co.?

A. Have been paid by the American Pipe Mfg. Co. purchasing the coupons from that time.

Q. The bondholders' coupons have been paid?

A. Yes, sir. If you will look at the bonds you will find that all the coupons that have been cut off have been paid.

Q. Up to what date?

A. Up to March 1st.

Q. This year?

A. Yes, up to and including the 1st of March.

Q. Then this suit was begun at the instance of the American Pipe Mfg. Co., was it?

A. No. I say it was begun because we were informed of the condition of things.

Q. In pursuance of that resolution?

A. If the Dawson Water Works Co. had continued paying the interest on the bonds, the suit would not have been brought.

Q. Didn't you act in compliance with this resolution?

A. That was notice of the condition of things and it was necessary to act.

Q. Didn't you bring this suit on account of this resolution? Wasn't that the moving cause?

A. That was really the first information we had of the con-
1028 dition of affairs, if you choose to put it in that way.

Q. I would like to get you to state whether or not you filed this suit on account of this resolution that was served upon you by the American Pipe Mfg. Co.?

A. That was not served upon us by the American Pipe Mfg. Co.

Q. The resolution that came from them, served by some one else: Wasn't that the cause of the suit?

A. In one sense it was.

Q. Who employed counsel to bring this suit?

A. We employed counsel.

Q. Who do you mean?

A. When we commenced suit?

Q. Who made the contract with counsel?

A. They were recommended to us by the Dawson Waterworks Co., as having been connected with the former suit.

Q. What officer made the contract with counsel to prosecute this cause?

A. No contract with counsel.

Q. Never made any contract?

A. Never made any contract with counsel.

Q. Who engaged counsel—what officer of the company engaged counsel?

A. I may say I did.

Q. By letter—in writing?

A. Verbally, that is, through the Dawson Waterworks Co.

Q. You never had any conversation with counsel yourself, verbally?

A. Had a number of communications.

Q. At the time—at the beginning of this suit you employed them through the Dawson Waterworks Co. verbally?

A. That they would be proper persons, being familiar—having been connected with the former suit.

Q. I want to get at the facts. I don't care for anything further: On this trial, you employed counsel through the Dawson Waterworks Co, by instructing them verbally—you never had any
1029 communication with counsel themselves until after suit was begun?

A. Our counsel was authorized to commence this suit in our name, in the interest of the bondholders, which was done.

Q. By verbal communication through the Dawson Waterworks Co.?

A. Yes, sir; that's it.

Q. You never made any contract with them?

A. Never made any contract, no. We paid the bills.

Q. Not until sometime after this suit was filed?

A. Very shortly—retaining fee.

Q. Do you remember the date of that payment?

The MASTER: How is that material?

Mr. LAING: This is on the question of collusion.

The MASTER: You need not answer that.

WITNESS: $1000, sir.

Q. This is September '99, that is the first payment? (Check)

A. I think so. I have a memorandum of all the payments.

Q. Prior to that time you had no other communication except verbally through the Dawson Waterworks Co.?

A. No.

Q. Are the Dawson Waterworks Co. or the American Pipe Mfg. Co. to pay back this fee you paid?

A. No, sir.

Q. No contract of that sort?

A. No, sir; no contract or agreement.

Q. Don't expect to hold them bound for it?

A. Certainly not. Expect to get paid as trustee. I have had a good many things of that kind and the trustee usually gets paid for the suit. We get the money we will be about the first class paid out of that fund. I suppose there will be some wreckage and the trustee will get paid out of that.

(Mr. WIMBERLY:)

Q. You mean the property down there?

A. It ought to bring something. Following your question: We have no agreement with the American Pipe Co.—neither
1030 company, or any one, for the payment of these charges. We have a moral obligation to the bondholders and a pecuniary interest in the matter ourselves, as being owners of bonds.

Q. You stated that your company never had any complaint at all until this suit was filed?

A. No, sir.

Q. Never been any communication from your company to the city council of Dawson in regard to the payment of it at all?

A. None at all.

Q. The first notice you had was the filing of this suit and the answer to this suit?

Mr. WIMBERLY: There was a letter in evidence to the mayor.

Q. Did you make any estimate as to the cost of running expenses for that waterworks in Dawson?

A. Yes, sir; I did.

Q. The amount of interest was to be $2400 per year?

A. Yes, sir. I really forget now; but judging by other plants of that kind, with which I was familiar, the expenses of running that plant would be about from $600 to $700 per year.

Q. From whom did your company buy these $10,000 worth of bonds?

A. Bought them from the American Pipe Mfg. Co., sir.

Q. From the president of the American Pipe Mfg. Co.?

A. Now I would not like to say who; but I bought them from the American Pipe Mfg. Co. and paid the American Pipe Mfg. Co. for them 92½ or $46.25 for each bond in money.

Q. Who sold the other bonds?

A. I think we sold a few of them.

Q. The American Pipe Mfg. Co. sold the principal part of them?

A. Yes, sir.

Q. At that rate of per cent. Do you remember how many bonds your company sold?

A. Do not.

Q. You say they sold a few.

A. I think they sold a few.

Q. Not certain about that?

A. I am not.

1031 Re-direct-examination.

(By Mr. WIMBERLY:)

Q. In whose interest was this bill filed and prosecuted?

A. In the interest of the bondholders. No other interest I know of in the matter.

Q. In whose behalf were you acting in bringing the bill and prosecuting it?

A. Let me understand: in whose behalf?

Q. Yes. I mean for whose benefit?

A. For the bondholders.

Q. I will ask you whether or not you have any agreement or understanding whatever with the Dawson Waterworks Co. or the American Pipe Mfg. Co. to prosecute this suit for their benefit or in their behalf?

A. None whatever.

Q. Are you in fact prosecuting it in any other behalf?

A. I am prosecuting it simply in the interest of the bondholders. I don't know of anyone else that has any interest.

Q. You spoke of expecting to get your money back out of the recovery or out of the wreckage, as you call it, the property down there, you speak as trustee now, do you,—compensation?

A. Compensation as trustee and for the outlay.

Q. Outlay you mean as trustee?

A. Yes, sir.

Q. You speak about making an estimate down there at the time of expenses and ability of the plant to pay, did you ever have any connection with the matter of water supply to municipalities?

A. Several times—occasions.

Q. Will you briefly state what that was?

A. In what——

Q. In the different capacities you have been in connection with the water supply—Philadelphia, for instance?

A. I was, only as chairman of the water committee for Philadelphia for three years.

Q. You were chairman of the water committee?

A. Yes, sir; for three years when I was a member of the city government.

1032 Q. Chairman of the water committee: had in charge the water department of Philadelphia—general direction of it: I will ask you in a general way—You made an affidavit to this original bill when it was filed: State whether or not that materially set forth, as you understood it then and understand now, your contention in the matter?

A. To the best of my knowledge and belief it is correct.

The MASTER: What is that in rebuttal of?

Mr. WIMBERLY: Mainly on the plea of collusion.

The MASTER: Collusion is really not material, if it relates only to

the parties; for the reason that there is a Federal question in the case; and collusion on the part of the parties to give jurisdiction over the parties, is not a material question, because there is a Federal question in the case. You may ask any questions that illustrate the relation of this trust company with the American Pipe Mfg. Co.

Re-cross examination.

(By Mr. LAING:)

Q. In answer to Mr. Wimberly's question you said you expected to get pay for these advances you are making, do you expect to get it out of the bondholders?

A. My thought has been that these are legitimate expenses under the mortgage that the trustee is allowed for the protection of the bonds. In a case of this kind sometimes they require an indemnity bond from the bondholders before commencing suit; but in this case I expect the company will get their compensation for the expenditures out of the suit, if it is won—out of the proceeds of it, if it is won. If not, the plant is certainly worth something and that would be the first bill to be paid.

Q. Have you no understanding with the bondholders to pay any part of this?

A. None whatever.

Q. You will claim a lien on the plant?

A. You will find in all trust mortgages with a trustee, a clause——

Q. The mortgage will speak for itself?

A. Yes sir; I expect we will be paid.

1033 J. W. HAWLEY, re-called, testified as follows:

Q. Do you own this bond now that you originally purchased?

A. No, sir.

Respondents' counsel proposed to ask witness J. K. Cuming what would be the probable cost of this litigation and upon objection by the complainant's counsel declined to allow the question to be asked.

J. W. HAWLEY, recalled, testified as follows:

(By Mr. WIMBERLY:)

Q. The books show that you originally purchased two of these bonds, $1000., do you own those now?

A. No, sir.

Q. When did you dispose of them?

A. If I ever owned them I don't remember it; but if I did I sold them.

Q. I will ask you if it was prior to the present litigation?

A. It has been some years. I bought the first bonds, Nos. 1 and 2. At that time I was dealing in various bonds and selling them—buying and selling them; but I can't remember to whom they went.

Cross-examination.

(By Mr. LAING:)

Q. You were president of the American Pipe Mfg. Co. at the time?

A. I don't think I was at that time. The books will show when I was elected. I succeeded Mr. Partridge. I don't remember the year.

Q. You say Mr. Cuming was a director in the American Pipe Mfg. Co.?

A. No, sir; our director. Director in the bank.

Q. You were president of the American Pipe Mfg. Co. at the time these bonds were issued?

A. I don't remember.

Q. You don't remember who you bought these bonds from?

A. Bought them from the company but don't know who I
1034 sold them to. Bought them from the treasurer. I was connected with the company at that time. I was vice president of the pipe company prior to my being elected president.

JOS. KEEN, JR., re-called by the complainant, testified as follows:

(By Mr. WIMBERLY:)

Q. You spoke of being in Dawson in '90 and again in '91, were you ever in Dawson after that?

A. I was in Dawson with Col. Hawley.

Q. What was the date of that visit?

A. That was Feb'y '92. Col. Hawley and I were visiting in the South and we went up from Thomasville. Think we arrived there in the afternoon of the 22nd of the month.

Q. Was Mr. Perot there at the time?

A. No, sir.

Q. Were you, Mr. Perot and Col. Hawley ever in Dawson at the same time?

A. No, sir, Mr. Perot, Mr. Hawley and I were never together in Dawson.

Q. State whether or not you ever had the conversation at which Mr. A. J. Carver was present?

A. Don't recollect the name. Don't recollect any conversation that ever occurred.

Q. State whether or not in any conversation while you were in Dawson he was present—do you remember his name?

A. No, sir; I do not.

Q. In which anything was said about the fitness of the water for use and a remark made by Mr. Hawley or any one else in your presence, that water would purify itself in 70 yards?

A. Don't think it is likely that I would have made such a remark, in fact I know I did not.

Q. Was it made by anybody in your presence?
A. Never heard of it.

Q. Prior to the beginning of this litigation, what complaint
1035 did you ever hear as to the quality of the water, was it discussed there at all, the fitness of the water for drinking purposes or house or domestic purposes?

A. Never heard of it at all until this suit was brought. Of course I was only there three times. The first time the waterworks were not built; and the second time I don't think they had started it and the last time I was there with Col. Hawley; and I think it was just about started. My recollection is that there was no knowledge of any complaint of any kind or description. In fact I could not recall the date; but the mayor was at the office here and expressed himself, as near as I can recollect, that they were much pleased with the waterworks.

Q. Mr. Carver tells of a conversation had at the time you were present, after bringing of the suit of A. J. Carver, Lowrey, I believe, against the Dawson Waterworks Co., in the city of Dawson, which was brought January 29th, 1894, were you ever in Dawson at all after that date?

A. No, sir; never was there after I was there with Col. Hawley.

Cross-examination.

(By Mr. LAING:)

Q. Do you remember when Mr. Hawley ceased to be president of the American Pipe Mfg. Co.?
A. Very well. Last year, at the last election.
Q. Do you know when he begun as president?
A. The minutes of the company will show. I think it was '94.
Q. Was he president when you were down there at that visit to the city of Dawson?
A. In '92?
Q. Yes.
A. No, my recollection is that he was not.
Q. What office did he hold with the American Pipe Mfg. Co.?
A. Vice president.
Q. How long had he been vice president, several years?
A. Yes, sir; I think so.

1036 Q. Prior to the beginning of this contract with the city of Dawson for water?

A. I think so. I could not say positively. That is a matter of record. If I had known you wanted to ask that I would have refreshed my recollection.

Q. You don't remember what conversation you had on these visits with the different people about waterworks?
A. No, sir,
Q. You don't remember Mr. Carver?
A. No, sir; absolutely no.

Q. You don't know whether you met him or not?
A. No, sir; never heard of the man. If I saw his picture I possibly might re-call him or having seen such a man.
Q. You may have met him and not remember it?
A. I think I would have recollected the name if had heard of it.
Q. Can you recollect the names of others you met there?
A. Can't recollect the name of any one except Mr. Horsley, our superintendent and mayor Dr. Cheatham.
Q. Would you have remembered Mr. Carver's name if you had met him?
A. I think I would.
Q. You didn't meet many folks?
A. Not a great many.
Q. Or talked to them?
A. Didn't talk to a great many. As easily remembered name as Carver I would possibly have remembered it.

J. W. HAWLEY, re-called by the complainant testified as follows:

(By Mr. WIMBERLY:)

Q. Just state——
A. I was elected vice president of the American Pipe Co. at the meeting held February 7, '900. I was elected to the vice presidency to fill a vacancy. I was elected president at a meeting of the board January 8, 1896.
Q. You held the office of vice president until about that time?
A. Yes, sir. Resigned the office of president last Janu-
1037 ary, this year, I think, 1902.

Cross-examination:

Q. Can you remember when you were elected president of the Dawson waterworks?
A. At the organization of the company I think.
Q. Were you president of the Dawson waterworks when these bonds were issued?
A. I signed the bonds I see.

H. BAYARD HODGE, sworn by the complainant, testified as follows:

(By Mr. WIMBERLY:)

Q. What office do you hold with the American Pipe Mfg. Co.?
A. Secretary and assistant treasurer.
Q. And with the Dawson Waterworks Co.?
A. Secretary.

Q. You have been secretary of the Dawson Waterworks Co. how long?

A. Since its organization.

Q. Have you the books here of the Dawson Waterworks Co.?

A. Yes, sir.

Q. Are they in court?

A. Books of account?

Q. The books which show the minutes and then the books which show the balance sheet?

A. Here is the minute book. I can get the general ledgers.

Q. Who keeps the accounts and passes on all matters of expenditures and enters all receipts of the Dawson Waterworks Co.?

A. I have charge of the books.

Q. State whether these books are correctly kept?

A. Yes, sir; they are.

Q. What was the cost of the Dawson waterworks—cost to date?

A. Cost to date is over $40,000.

Q. Does that include the present tower?

A. Yes, sir.

Q. That is all set out in these books?

A. Yes, sir.

1038 Q. Are you the keeper of the books which show the receipts and disbursements and entries affecting the finances of the American Pipe Mfg. Co.?

A. Yes. sir.

Q. Can you tell from your books the dates when the different bonds of the Dawson Waterworks Co. were sold by the American Pipe Mfg. Co.?

A. Yes, sir.

Q. And the persons to whom sold?

A. Yes, sir.

Q. Have you that book here?

A. Yes, sir; I can get it.

Q. Have you the resolution setting forth the contract between the Dawson Waterworks Co. and the American Pipe Mfg. Co. for the building of its plant and price to be paid?

A. Yes, sir.

Q. I will ask you if there was any other contract signed further than the resolution itself?

A. That's all.

Q. That is the contract?

A. Yes, sir. (Page 19)

Q. State whether or not that contract was accepted and acted upon?

A. Yes, sir.

Q. State whether or not the American Pipe Mfg. Co. did do what that contract calls for?

A. Yes, sir; it did.

Q. I will ask you whether or not the bonds that were to be turned over under that contract were turned over under that contract?

A. Yes, sir.

Q. I will ask you who furnished the money that built the waterworks plant of the Dawson Waterworks Co.?

A. The American Pipe Mfg. Co.

Q. How were they—how did they expect to be reimbursed for money furnished?

A. By bonds.

Q. Bonds called for by this contract?

A. Yes, sir.

Q. How did they expect to realize the money?

A. Selling the bonds.

Objected to.

1039 Q. I will ask you if you are the man who has charge of the financial end of your company so as to know these things of your own knowledge?

A. I made the entries.

Q. All came directly before you?

A. Yes, sir.

Q. Rest directly in your own knowledge, these matters I asked you about.

Q. You say you expected to get the money from the sale of bonds, I will ask you if the company in fact did sell them?

A. Yes, sir.

Q. Will your books show a record of the sales?

A. Yes.

Q. Turn to the place in the book.

Q. I will ask you whether or not this accurately shows the sale of the different bonds and the price they brought?

A. Yes, sir.

Q. Who gave this order to the trustee to turn these bonds over?

A. Who delivered it to the trustee?

Q. Whose signature is that?

A. Mine.

Q. That is the paper that was given?

A. Yes, sir.

Q. I will ask you whether or not these bonds were turned over that this paper calls for?

A. Yes, sir.

Q. By cash, $920. What is that?

A. Means that we got $920. for $1000. worth of bonds.

Q. 92½ means what?

A. Means 92½ per cent.

Q. Price at which the bond sold?

A. Yes, sir.

Q. Date, Feb'ry 4, '92?

A. Date we got the cash.

Q. That $9515., Columbia Avenue, 10,000 at 92½, that means the price at which they were sold to the purchaser.

Q. Same is true as to these others?

A. Yes, sir.

Q. There are some names here that are not written out in full, just the initials, give the date of the purchase, and the amount of the purchase and the name of the purchaser?

A. This is T. H. Hall, 1000, 95. L. K. Perot, 2500, 92½.

Q. That is the price at which they were purchased.

1040 (See statement of bond sale, page 674.)

Q. State whether or not the sales of the bonds were actually made at the dates named and the money paid as shown on these books?

A. Yes, sir.

Q. Bought by the purchaser?

A. Yes, sir.

Q. Do you know where these different people live whose names appear on your books as purchasers of these bonds?

A. Know where they did live. Some are dead.

Q. At the time they made the purchases?

A. Yes, sir.

Q. Where?

A. Mr. Hall lived in Media, Columbia Avenue Trust Co., Philadelphia.

Q. That is the complainant in this case?

A. Yes, sir. L. K. Perot, Philadelphia. Thomas H. Hall, Swarthmore, Pa. I. L. Miller, Philadelphia. J. W. Hawley, Media, Pa. F. M. and H. Brooke, Philadelphia. L. K. Perot, Philadelphia. Thomas H. Hall, Swarthmore. Wm. H. Miller and W. Y. Hoopes, Media. Edwin F. Partridge, Philadelphia.

Q. You say some of these people are dead?

A. Yes, sir.

Q. Those still living live where?

A. Same place.

Q. Those dead lived where at the time of their death?

A. As stated, except Mr. Partridge, who died in California.

Q. How were those bonds sold?

A. For cash.

Q. I mean how was the sale negotiated?

A. By the officers of the pipe company. Sold to them and they paid cash for them and the bonds then delivered.

Q. Do you know who owns those bonds now?

A. No, sir.

Q. Are any of them owned by the American Pipe Mfg. Co.?

A. No, sir.

Q. Or by the Dawson Waterworks Company?

A. No, sir.

Q. Where do you reside?

A. Philadelphia.

Q. Prior to the litigation that was begun, first litigation, June 24, '94, were you ever in Dawson, Ga.?

A. No, sir.

Q. How often have you been there since?

1041 A. I think about three times.

Q. At what times and what was the object of your visit?

A. Object was a witness in the original litigation between the Dawson Waterworks Co. and the City of Dawson.

Q. You mean the suit brought for the collection of the rental in '95?

A. Yes, sir.

Q. Can you fix the date positively, except that it was during the pendency of that litigation?

A. That's all.

Q. At the terms of court?

A. Yes, sir.

Q. I will ask you whether while you were there or anytime prior thereto, you ever heard of any complaint as to the character of the water or the pressure?

A. No, sir.

Q. When was the first time that you ever heard of any contention that the pressure was not right?

A. When they stopped paying the hydrant rental.

Q. How long after that was it that any such contention as that, you remember?

A. No, sir; I do not.

Q. So far as the issue developed on the trial of that case by the evidence submitted, state whether or not you heard of any complaint?

A. No, sir; I did not.

Q. Was there any complaint as to the character of the water or its fitness for drinking purposes or domestic use?

A. Not that I know of.

Q. As secretary of the company have you ever received any complaint?

A. Not to my knowledge.

Q. As far as you know has it ever been made to the Dawson Waterworks Co. through any of its officers?

A. No, sir.

Q. I believe you stated that all the revenue goes through your hands?

A. Yes, sir.

Q. Exclusive of the $2000 which was paid by the city year by year for hydrant rentals, I will ask you if there is or has been

1042 at any time, sufficient revenue of the Dawson Waterworks Co. to pay interest on the bonds, without the $2000?

A. No, sir; not enough.

Q. How have the revenues of the company been affected by this litigation?

A. A great many contracts have been cancelled and water turned off the premises.

Q. Will you look at that book and see during what years the hydrant rentals were paid and exactly what is in default?

The MASTER: Isn't that an admitted fact? That it was paid up to January 1st, 1895.

Q. There is no dispute, as I understand it, about the fact that all the hydrant rentals have been paid up to Dec. 31, 1894, except the sum of how many dollars, $40?

A. $440.

Mr. WIMBERLY: That was retained for back taxes.

Q. When was the first notice that the Dawson Waterworks Co. gave the bondholders or their trustee, of any litigation or trouble down there in Dawson?

A. In '99.

Q. What time: Can you refer to your books and tell what time in '99: Who makes the record of the minutes?

A. I do.

Q. Yourself, personally?

A. Yes, sir.

Q. Your handwriting?

A. Yes, sir.

Q. Refresh your recollection?

A. April 1899.

Q. What time in April?

A. April 5th, 1899.

Q. Prior to that time had the Dawson Waterworks Co. or the Pipe Co. ever notified them of there being any trouble or being any dispute about the validity of that contract?

A. No, sir.

Q. Did you let them know by resolution passed?

A. Yes, sir.

Q. Are you the keeper of the minutes of the American Pipe Mfg Co.?

A. I am.

Q. Have you the date they passed that resolution—about the same time?

A. Yes, sir.

Q. Have you their books here?

A. Yes, sir.

1043 Mr. WIMBERLY: I believe in your plea you don't dispute the fact that you were notified of these matters by letter?

Mr. LAING: I don't know whether we admit it in the plea or not.

Mr. WIMBERLY: It is, I believe, in evidence, or rather a fact that the mayor was called upon to pay, sometime in April, by a letter ad-

dressed to the mayor, the hydrant rentals in future to the trustee on account of the action that had been taken.

Mr. LAING: I don't remember about the date.

Mr. WIMBERLY: It wasn't dated. The letter was received prior to the bringing of the bill. The bill was presented to Judge Pardee in April.

Mr. LAING: I don't know about those facts.

Mr. WIMBERLY: You will get it for me?

Q. This is the resolution?

A. Yes, sir.

Q. Who advanced the money to pay for the present water tower?

A. The American Pipe Mfg. Co.

Q. I will ask you why it was they advanced the money to pay for that tower and put it up—upon what?

A. Because they thought the Dawson Waterworks Co.—the Columbia Avenue Trust Co. would win this suit; and then the Dawson Waterworks Co. would be in a position to continue.

Q. Your books there, I believe, show the items of cost of that?

A. Yes, sir.

Q. You are secretary of the company and keep the minutes?

A. Yes, sir.

Cross-examination.

(By Mr. LAING:)

Q. You are the secretary of both companies?

A. Yes, sir.

Q. This shows that that bond was sold to Mr. J. W. Hawley?

A. Yes, sir.

1044 Q. $1000?

A. Yes, sir.

Q. Was he president of the pipe Co. at that time?

A. Not at that time, vice president.

Q. President of the Dawson waterworks?

A. Yes, sir.

Q. This sale to J. W. Hawley, that is the same person?

A. Yes, sir.

Q. This item here to J. F. Partridge, $6000. worth of bonds, was he the president of the American Pipe Mfg. Co.?

A. Yes, sir.

Q. The Columbia Avenue Trust Co., they are the complainants in this case?

A. Yes, sir.

Q. Who is L. K. Perot?

A. He is a Philadelphia business man.

Q. The officer that is mentioned in this book here is he a relative of his?

A. He is a cousin, I think.

Q. Who is Thomas H. Hall?

A. He was a broker. Man who sold bonds.

Q. All you know about the sale of these bonds, I presume, is what the books show?

A. Except that I was informed that sale had been made to Mr. Partridge, Mr. Hawley and other people.

Q. You put down what they told you to put it?

A. No, sir; that is where I got the cash from.

Q. You know nothing of your own knowledge of these transactions except as the book-keeper, they were handed to you by the officers of the company, that true?

A. I probably deposited the checks and made the entries.

Q. The transactions as to the sale of the bonds, you know nothing about them of your own knowledge?

A. No, sir.

Q. You were the book-keeper and kept them as they were returned to you?

A. Yes, sir.

Q. The Dawson Waterworks Co. never assigned their right to collect these rentals until after this decision of the supreme court of Georgia?

A. To the Columbia Avenue Trust Co.

1015 Q. Never assigned it to them until after that decision?

A. I think they passed a resolution ordering or authorizing the trustee to collect it.

The MASTER: It is in evidence that it was after the decision in that case.

Mr. WIMBERLY: Yes, sir.

Mr. LAING: All agree about that.

Q. Up to that time the Dawson waterworks had insisted on collecting the rentals themselves and in their own right, did they not?

A. They collected the rentals when it was handed to them.

Q. They claimed the right and so notified the town of Dawson?

A. I don't know of any notice to the town of Dawson.

Q. You signed that letter, didn't you?

A. Yes, sir.

Q. As secretary of the Dawson waterworks, as it purports to be?

A. Yes, sir.

Q. Do the books of the Dawson Waterworks Co. show that the interest on these bonds has been paid up to date?

A. No, sir.

Q. You keep their books also?

A. Yes, sir.

Re-direct examination.

(By Mr. WIMBERLY:)

Q. Right on the last question asked you about the interest being paid, you stated that the Dawson Waterworks Co. hadn't paid the interest since the suit, what has become of the interest coupons since suit was commenced?

A. Went to the American Pipe Co.

Q. Have they been paid? Those interest coupons?

A. No, sir.

Q. State whether or not they have been satisfied or held by the pipe company—American Pipe Co.?

A. Held by the pipe company uncancelled.

Q. I will get you to get those coupons, are they about the building?

A. Could not get them until tomorrow. They are in a
1046 trust company's box in the Girard Trust Company's box, where they keep their securities.

Q. Box where they keep their different papers?

A. Yes, sir; in their safe deposit vaults.

Q. I will ask you if the Dawson Waterworks Co., since their revenue was held up from the contract—or in other words since January 1st, 1895, has had funds to pay any of the interest, or has in fact had any of its own funds with which to pay interest since January 1st, 1895?

A. No, sir; borrowed money from the American Pipe Co. to pay it.

Q. Has it paid that money back or any part of it?

A. No, sir.

Q. Has it had revenues out of which it could pay it since that time?

A. No, sir.

Q. I will get you to turn to that list of bonds that Mr. Laing asked you about and ask you to state some of the parties who are dead—let you state who are dead?

A. Mr. Thomas H. Hall, Mr. F. M. Brooke, Mr. Walker Y. Hoopes, and Mr. E. F. Partridge.

Q. They are all dead?

A. Yes, sir.

Q. Do you remember the date you made the sale to Thomas H. Hall?

A. I don't know. I probably did when they came in the office, as I generally deliver the bonds to them.

Re-cross-examination.

(By Mr. LAING:)

Q. You spoke of borrowing the money from the American Pipe Mfg. Co., who borrowed that money?

A. The Dawson Waterworks Co.

Q. What officer?
A. Treasurer.
Q. You didn't have anything to do with it, only kept the books?
A. I probably made the check. Can tell by looking at the books.
1047 Q. Arrangements were made through some one else and you as secretary kept the books?
A. Yes, sir.
Q. Could you get those checks?
A. Yes, sir.
Q. You don't know where any of these bonds are now—you don't know in whose possession and control they are in?
A. No, sir.
Q. Any of them at all?
A. No, sir.

J. W. HAWLEY, re-called by the complainant, testified as follows:

(By Mr. WIMBERLY:)

Q. Who made the sales of these bonds for the American Pipe Mfg. Co.?
A. I made the majority of them.
Q. I will ask you at the time of making the sales if all the information—what information the purchasers had?
A. That was the object I had in going down there, was to see the works—the object I had in visiting with Mr. Keen to see the conditions so as to give my judgment as to the value of the bonds. We sold them on the information I received by visiting the plant.
Q. At the time you made these sales did you believe the contract to be valid and everything?
A. Yes, sir.

Objected to and objection sustained.

Q. What knowledge had the purchasers of any ground of objection to the contract or the waterworks at the time you made these sales?
A. None whatever.
Q. State whether or not these sales were openly and fairly made?
A. Yes, sir.
Q. The books, I believe show $1000. of bonds of yours and some others, will you explain that?
A. I would send in to send out in my name bonds. The
1048 accounts of the company are kept here; and I would simply write to send out 1000 or 2000 dollars worth, whatever the party would want and I would deposit the amount of money to their credit in our bank. That's the reason why so many are in my name.
Q. I will ask you as a matter of fact how many you actually bought yourself?

A. The first thousand was my own.

Q. Could you tell approximately how long you owned that $1000. bonds before you resold them?

A. I can't tell. The truth of the matter, may be owned by my wife or daughter.

Q. May be owned by them yet?

A. Yes. I think it is in my wife's name. If it is, it was bought for full value. She has her own money.

Q. I will ask you if it was sold prior to the first litigation of the city—prior to the litigation in June, 1894?

A. Prior to that time. I had forgotten that I had owned a bond. The owners of these bonds know nothing about this, as far as my wife is concerned. She knows nothing about the litigation, because the coupons are paid.

Q. Have you owned any bonds at all since first of June, '94?

A. No, sir; don't think I have.

Cross-examination.

(By Mr. LAING:)

Q. You don't know who these other six bonds that the books show have been sold to you belong to?

A. No, I don't know. I don't know the numbers of them now.

Mr. LAING: We offer the following letter:

PHILADELPHIA, PA., *Oct.* 27, 1897.

To the hon. mayor and council of the city of Dawson, Ga.

GENTLEMEN: At a meeting of the board of directors of this company, held Oct. 22nd, 1897, the following resolution was unanimously adopted; and this notice is sent to you in compliance with said resolution, viz: 1049

"Resolved: That the proper authorities of the city of Dawson, Georgia, be requested, that, from and after this date, they make all payments due this company on account of hydrant rental or other indebtedness, by check, draft, or warrant, payable to the order of the treasurer of the Dawson Waterworks Company. And the secretary is hereby instructed to mail a copy of this resolution to the said authorities of the city of Dawson, Ga."

Yours truly,

H. BAYARD HODGE,
Secretary Dawson Waterworks Co.

The hearing then adjourned until the next day at 10 o'clock.

J. K. CUMING, re-called and examined by Mr. Laing, testified as follows:

Q. You say you made an investigation as to the security upon these bonds, payment of the interest and principal and so on, did you rely solely upon the contract with the Dawson Waterworks Co. with the city council of Dawson for the security of these bonds?

A. I will have to go back, perhaps, and make a lengthy answer, if it is germane: The American Pipe Mfg. Co., we have had different transactions with them. We have always found them very careful in looking into the legality for the erection of plants, where they enter into contracts. They did so in this case, at least they so informed me; and from the contract it struck me that they had been, if anything, over-careful in this case; and I took it for granted that as far as the legality and from the knowledge I had of
1050 it—from the information I had, I thought it was a perfectly legal contract.

Q. That was through the American Pipe Mfg. Co.?

A. That was the American Pipe Co. and through our attorneys.

Q. Took their word for it?

A. Took their statement and the attorneys investigated the matter and found it satisfactory.

Q. Their attorneys, you mean?

A. Yes, sir.

Q. You didn't have an attorney to investigate it though?

A. I don't think I ever had any opinion from their attorney; but I had the word of the American Pipe Co.

Q. Then you didn't rely solely upon the contract with the Dawson—that the Dawson Waterworks Co. had with the city council of Dawson for the security of those bonds?

A. I did rely on that. That is the first part, as I tell you. I am speaking purely about my idea as to the legality of the contract with the city of Dawson.

Q. That is not what I care for you to answer: Upon what did you rely for the security of these bonds in recommending the bonds to the purchasers?

A. I will tell you very briefly, if I can answer that. I- the first place I relied on the contract being legal, from the information I had; and in the next place, a matter on which I thought I was competent to judge. I went over the contract with the city of Dawson. It appeared to me to be a good, reasonable contract. After going to Dawson and seeing the city authorities and the people there and looking over the town, the expenditure was about $40,000, it struck me that there was plenty of material there to take care of the waterworks not costing any more than that. I found the people there favorably disposed, not only officially——

Q. You went over that?

1051 A. On the three things. First: my information as to the legality of the contract——

Q. Through the representation of the American Pipe Co.?

A. Through the represenation of the American Pipe Co.? No, every reasonable man would form some sort of an opinion. The next was the disposition of the people down there, favorable to the contract with the city of Dawson. It struck me that it was a good, plain legal contract—legally and morally, and one reasonable for both sides; and on the strength of that we purchased the bonds and recommended them to others.

Q. The interest on these bonds was $2400. per year?

A. $2400.

Q. The contract with the city of Dawson was $2000?

A. Yes, sir.

Q. What did you estimate for running expenses?

A. Well, we judged that from other plants.

Q. What estimate did you make for this plant?

A. Not over a $1000. at the outside.

Q. For running expenses?

A. Yes, probably under that.

Q. So that is the estimate you went by in making your calculation as to the security?

A. Yes.

Q. Did they come up to your estimates?

A. The receipts?

A. I am sure I could not tell. That is easily ascertained.

Q. What estimate did you make for receipts from other sources?

A. I thought that the consumers in the city of Dawson ought to pay, not immediately, but within a reasonable time, $2000. a year for water rents, making the income about $4000. a year.

Q. They never came up to that, receipts from all sources: The fact is they didn't pay but very little above running expenses outside of the contract with the city, up to the litigation and before?

A. That is something that I cannot answer.

1052 Q. The bonds were to mature in 1916?

A. Yes, sir.

Q. The receipts from the city lacked $400. of paying the interest on the bonds per year?

A. Yes, sir.

Q. Up until the end of the contract with the city?

A. Yes, sir.

Q. Which was 20 years from the beginning of the contract?

A. Yes, sir.

Q. The contract with the city would end in 1911?

A. 16, isn't it?

Q. Twenty years?

A. Yes, sir.

Q. Then there would be 4 or 5 years after the expiration of the contract with the city for which the bondholders would have to look entirely to the receipts from private consumers to pay interest.

A. I don't think really that is a thing to go into.

Q. That would be true?

A. It would be a fact if they were confined entirely to private consumers.

Q. They would have no revenue from the city?

A. There contract would have expired but there is a possibility that they would have made another contract.

Q. I am asking as to your basis for your judgment as to the security for these bondholders?

A. I considered if the contract was carried out in good faith as made, that there would be no doubt about the security for the bondholders.

Q. You have given your estimate as to the figures you made that entered into the security for these bonds?

A. Yes, sir. My impression was at the expiration of the 20 years that the city of Dawson would be able to pay the whole interest on the bonds; and more than that they would be replaced with another issue of bonds of not more than 5 per cent. Will you let me state what I consider a reasonable time?

Q. Yes, sir.

—. Four to five years.

1053 Q. As to when they would begin to make the amount you estimated?

A. Yes, sir; from my experience, a steady increase.

Q. So far as you know they have never come up to that calculation?

A. I could not answer that. I have not looked into that.

Q. Then you say upon that kind of security you recommended these bonds?

A. Yes, sir.

Q. Solely upon that security?

A. Certainly, and upon the prospects.

Q. You hold any guarantee from the American Pipe Mfg. Co. or anybody else?

A. If there is any guarantee made by the American Pipe Co. or anybody else, I know nothing about it. I would be very glad if there was. I would be very glad if the American Pipe Mfg. Co. would guarantee these bonds.

Q. Is there any other sort of guarantee except this contract with the city of Dawson?

A. No, sir.

Q. You based your estimate on the figures you have given?

A. Yes, sir; if the American Pipe Mfg. Co. will guarantee anything I will be glad to know it.

Cross-examination:

(By Mr. WIMBERLY:)

Q. You spoke of the bonds—I mean the contract with the city of Dawson running 20 years and the bonds running 25 years which

are the critical years with the average bond contract, the meeting of expenses and keeping it as a going concern, the first 20 years or the last 25?

A. The critical period is the first three years of the existence of the company.

Q. You have had considerable experience with different concerns, as a trust company?

A. Yes, sir.

Q. You personally?

A. Yes, sir.

Q. Based on your experience, I will ask you, where you have of the total interest required—fixed charge, I will call it—inter-

1054 est charge of $2400., a guarantee from a responsible party like a city, for as much as $2000. of the $2400., how does that enter into the element of security as compared to a town of the same size, where you had no fixed income guaranted to you at all—one large consumer, I mean?

A. What do you mean by large consumer?

Q. A contract that would bring in as much or more than $2000., for instance, any city, to begin with?

A. In nearly every instance that I have been connected with, that has been true, a fixed rental for fire protection in nearly every instance.

Q. I asked you if that is a necessary element on which to rely in negotiating that bond?

A. Yes, sir. You look at the growth of the place—future growth of the place, the increase in the consumption of water from year to year, which increases your revenues.

Q. In other words, with that much in sight you take something for the future growth of the town?

A. Yes, sir.

Q. Where there is no litigation, unfriendliness of the people to retard the natural growth of the system, what is the history as to whether the income from private consumers increases or falls off?

A. I should say that in a case of this kind, that the very fact of litigation and the possible talk of another system of waterworks, would prevent an increase in revenue.

1055 The following documentary evidence introduced by the complainant:

"Copy of resolutions adopted at meeting of the board of directors of the Dawson Water Works Co., held at 112 N. Broad street, Philadelphia, April 5th, 1899, at 2.45 p. m.

The following communication was received from the American Pipe Manufacturing Company and was read by the secretary.

The American Pipe Manufacturing Company this day passed the following resolution:

Be it resolved: That this company will not advance to the Dawson Water Works Company any more money with which to pay in-

terest on its bonds, unless the trustee for bondholders shall give to this company some assurance satisfactory to this company that said trustee will endeavor to collect from the city of Dawson the hydrant rentals already due and in default, as well as those falling due hereafter, in order to indemnify this company for the amounts already advanced as well as protect this company in the future.

Resolved further: That in the opinion of this company, the trustee ought to demand from the city of Dawson that the hydrant rentals be paid direct to the trustee, and ought to take proper steps to see that they are so paid.

Resolved further: That the Dawson Water Works Co. be notified by this company that unless it consents for the trustee to collect the hydrant rentals, including those already due, this company will not advance further money to pay interest on the bonds.

After a full discussion:

It was resolved: That whereas, the failure of the city of Dawson to pay hydrant rental due for the past few years had left the Dawson Water Works Co. unable to provide the interest which will
1056 fall due at the next interest period on the bonds issued by the waterworks Co.; and that default would cause incalculable injury to innocent parties holding said bonds, it is the sense of the directors of the Dawson Water Works Company that said company should accede to the demand made by the American Pipe Manufacturing Company,—

Whereupon, be it resolved: That the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, trustee for bondholders be authorized and requested to demand and receive from the city of Dawson, the sums due by said city under its contract for water furnished for fire protection during the years 1896, 1897, 1898 and future sums as they become due, and said trust company, by this resolution, is authorized and empowered to enforce the collection thereof; and said city of Dawson is hereby directed to pay said sums due and to become due for fire protection, to said trust company in accordance with the obligations and stipulations of the water works contract entered into by said city of Dawson.

Unanimously adopted."

Copy of resolutions adopted at meeting of the board of directors of the American Pipe Manufacturing Company, held at office, April 5, 1899, at 2.30 p. m.

The general manager presented a statement of the account of the Dawson Waterworks Co. whereby it is shown that by reason of the failure of the city of Dawson to pay its annual hydrant rental it has been necessary for this company to advance money to enable the Dawson Waterworks Co. to pay the interest on its bonds, which bonds are held by innocent parties, the sum so advanced amounting to eight thousand five hundred and sixty ($8560.) dollars.

1057 And it appearing that the city of Dawson is about to take steps towards issuing bonds for the purpose of building its own system of waterworks, and refuses to be bound by the terms of

its contract with the Dawson Waterworks Co., and for several years past has failed to pay the semi-annual payments due by the city of Dawson for fire protection.

After hearing said statement the following resolution was offered by Mr. Bunting seconded by Reynolds and was unanimously passed:

Be it resolved: That this company will not advance to the Dawson Water Works Company any more money with *this* to pay interest on its bonds unless the trustee for the bondholders shall give to this company some assurance satisfactory to this company that said trustee will endeavor to collect from the city of Dawson the hydrant rentals already due and in default, as well as those falling due hereafter, in order to indemnify this company for the amounts already advanced, as well as protect this company in the future.

Resolved further: That in the opinion of this company the trustee ought to demand from the city of Dawson that the hydrant rentals be paid direct to the trustee and ought to take proper steps to see that they are so paid.

Resolved further: That the Dawson Waterworks Company be notified by this company that unless it consents for the trustee to collect the hydrant rentals, including those already due, this company will not advance further money to pay interest on the bonds.

Unanimously adopted.

1058 Copy of resolutions adopted at meeting of board of directors of the Dawson Water Works Company held at office 1326 Chestnut street, Philadelphia, August 17th, 1891, at 3.45 p. m.

Whereas: The American Pipe Mfg. Co. is the owner of the exclusive franchise to supply water to the city of Dawson, and have offered to dispose of said franchise to this company for 200 shares of the full paid capital stock.

Resolved: That we accept the proposition and the proper officers are hereby instructed to issue and deliver 200 shares of "The Dawson Water Works Company" to the American Pipe Manufacturing Company, upon the assignment of said franchise to this Co.

Adopted.

On motion:

Resolved: That whereas, the American Pipe Mfg. Co. are now engaged in building and constructing the water works system for Dawson, Ga., and have offered to deliver same complete in accordance with the terms of the franchise to this company for the consideration of $38,000 of the 1st mortgage 6% bonds and 195 shares of full paid capital stock of "The Dawson Waterworks Co." therefore, the proper officers are hereby instructed to accept the terms proposed by "The American Pipe Mfg. Co.," and to pay such amounts of bonds and stock to them from time to time as the work progresses.

Adopted.

1059 (It was agreed and understood by counsel that the following is an exact copy of Dawson Water Works Co.'s bond, the only difference being as to the numbers of the bonds, and said copy was introduced by the complainant upon agreement with counsel representing respondents (Mr. Laing) in lieu of original; said bonds being numbered 1 to 80 inclusive, $500. each.)

UNITED STATES OF AMERICA,
State of Georgia.

$500. No. 28.

The Dawson Water Works Company.

First mortgage loan of $40,000.

The Dawson Water Works Company acknowledges itself to be indebted to bearer, in the sum of five hundred dollars, lawful money of the United States of America, which sum the said company promises to pay to the said bearer at the office of the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company in the city of Philadelphia, State of Pennsylvania, on the first day of September, anno Domini, one thousand nine hundred and sixteen on the presentation and surrender of this bond, with interest thereon, at the rate of six per centum per annum, payable semi-annually on the first days of the months of March and September, in each year, until maturity, on the delivery of the annexed coupons therefor, at the said office;

This bond is one of a series of eighty bonds, of like tenor, date and amount numbered consecutively from number one to number eighty inclusive amounting in the aggregate to forty thousand dollars and is entitled to the security to be derived from the mortgage of
1060 the Dawson Water Works Company aforesaid bearing even date herewith, upon the works and estates, real and personal and corporate rights and franchises of the said company duly authorized, executed and delivered by the said company to the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company aforesaid, as mortgagee in trust to secure the full and final payment of the principal and interest of the said bonds, without preference or priority and also to the benefit of the sinking fund provided for the redemption of the same, and providing for the maturity of the principal of the said bonds in the case of a default in payment of interest for the space of six months in the manner therein mentioned, as will more fully appear by reference to the said mortgage of record in the county of Terrell in the State of Georgia.

The principal and interest of this bond are payable without deduction for any tax or taxes which the said company is or may be required by the laws of the State of Georgia or of the United States to retain therefrom, the said company hereby agreeing to pay

the same. The principal of this bond may be registered in the name of the owner on the books of the registrar of the company at the office aforesaid at the option of the holder, and a certificate of such registration shall be endorsed hereon, and upon such registration, the registered owner only, or the legal representative of such owner, shall be entitled to receive the principal of this bond. Such registered owner, may however, make this bond transferable by delivery, by registering the same on the books of the registrar of the company, to bearer, and having a certificate of such registration endorsed hereon; and successive registrations may in like manner be made from time to time in the name of the owner or bearer, at the option of any holder hereof.

1061 In witness whereof, the Dawson Water Works Company aforesaid, have caused this bond to be sealed with their corporate seal, and to be signed by their president, and the execution hereof to be attested by their secretary, this first day of September anno Domini, one thousand eight hundred and ninety one.

(Signed) J. W. HAWLEY, *President.*

Attest:

(Signed) H. BAYARD HODGE, *Secretary.*

Coupons Nos. 26 to 50, inclusive, attached hereto, reading as follows:

The Dawson Water Works Company, will pay to the bearer on the first day of March, 1915 at the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, in the city of Philadelphia, fifteen dollars, lawful money of the United States of America, being six months' interest on bond No. 28.

(Signed) WM. S. PEROT, JR., *Treasurer.*

$15.00.

Endorsed: No. 28. $500. The Dawson Water Works Company, 6 per cent. first mortgage loan of $40,000. Principal payable Sept. first, 1916. Interest payable March & September at the Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, Philadelphia, Pennsylvania.

1062 This bond is one of the series of bonds within mentioned, and is entitled to the security of the mortgage therein recited.

THE COLUMBIA AVENUE SAVING FUND, SAFE DEPOSIT, TITLE AND TRUST COMPANY, *Trustees,*

(Signed) By JNO. K. CUMING, *President.*

Date of registry.	In whose name registered.	Registrar.
June 3, 1899.....	The Columbia Avenue Saving Fund, Title & Trust Co., Phila., Pa. Trustees under conditions of a declaration of trust *in re* estate of Howard F. Cramp (a minor).	The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Co.

Feb. 10, 1900.
(Signed) WALTER SCOTT, *Sec'y.*
" WALTER SCOTT, *Sec'y.*
THE COLUMBIA AVENUE SAVING FUND, SAFE DEPOSIT, TITLE AND TRUST CO.

Bonds of the Dawson W. W. Co. Sold by the American Pipe Mfg. Co.

1892.		
Feb. 3.	J. W. Hawley	1000.00
9.	Col. Ave. S. F. S. D., T. & T. Co	10000.00
9.	L. Knowles Perot	2500.00
April 13.	" "	2000.00
Feb. 18.	Thos. H. Hall	1000.00
Mar. 7.	" "	500.00
1063		
May 3.	Thos. H Hall	1500.00
Mar. 9.	Isaac L. Miller	2000.00
Apr. 1.	W. Y. Hoopes	3000.00
July 13.	"	500.00
Apr. 5.	Brooke	3000.00
May 17.	W. H. Miller	6500.00
Nov. 16.	Thos. C. Else	6000.00
		40,000.00

Bonds of the Dawson Waterworks Company Received by the American Pipe Mfg. Co.

12 / 26 / 91	Bonds for construction, as per contract	38000.00
12 / 26 / 91	Bonds for cash advanced and for supplies etc...	1000.00
4 / 1 / 92	Bonds for cash advanced and for supplies, etc...	1000.00
		40000 00

Statement of Sale of Bonds of the Dawson Waterworks Co. by the American Pipe Mfg. Co.

1892.						
Feb. 4.	J. W. Hawley,	1000	bonds, at	92½	int.....	920.00
9.	Col. Ave. S. F.	10000	"	"	"	9515.00
9.	L. K. Perot	2500	"	"	"	2378.75
17.	T. H. Hall,	1000	"	95	"	998.00
Mar. 7.	"	500	"	100	"	500.00
9.	J. L. Miller,	2500	"	92½	"	2315.83
April 1.	J. W. Hawley,	3000	"	91½	"	2790.00
April 5.	F. M. & H. Brooke,	3000	"	"	.....	2792.49
April 13.	L. K. Perot,	2000	"	"	.....	1864.33
May 3.	T. H. Hall,	1500	"	100	.....	1500.90
May 17.	W. H. Millerand W. Y. Hoopes,	6500	"	92½	.....	6094.83
1064						
July 15.	W. Y. Hoopes,	500	"	94	.....	481.00
Nov. 16.	E. F. Partridge,	6000	"	95	.....	5777.00
		40000				37927.23

It was agreed between counsel for complainant and respondents that the foregoing testimony (pages — to —), should be inserted in the record upon the certificate of the stenographer that the same is a true and correct copy of the originals.

I hereby certify that the foregoing pages of typewritten matter, pages 665 to 668 is a true and correct transcript from the minute books of the Dawson Waterworks Company and the American Pipe Mfg. Co.; and that the copy of bond issued by the Dawson Water Works Co., pages 669 to 672, is a true and correct copy of said bond.

I further certify that the foregoing pages 673 to 674 is a true and correct copy of statements of bond sales furnished me by H. Bayard Hodge, secretary.

(Signed) GEO. C. PALMER,
Stenographer.

1065 Dawson Water Works Company.

Plant A / c to 3 / 31 / 1902.

Original contract bonds	$38,000.00
Additions, etc. 1892	645.00
" " 1895 and 1896	116.88
" " 1897	89.26
" " 1898	215.57
" " 1899	33.95
" " 1900	108.30
Standpipe & foundations, 1900	7,357.90
Additions, etc. 1901	386.95
" " to 3 / 31 / 1902	15.73
Total	$46,970.04

In the Circuit Court of the United States for the Western Division of the Northern District of Georgia.

COLUMBIA AVENUE SAVING FUND, S. D., T. & T. COMPANY vs. CITY OF DAWSON ET AL. } In Equity.

STATE OF PENNSYLVANIA, *City and County of Philadelphia.*

Before me, the undersigned, appeared in person H. Bayard Hodge, who being duly sworn deposes and says on oath that he is the secretary of the Dawson Water Works Company, and is the keeper and custodian of its books and records and makes up all the records of its receipts and disbursements and the same remain of file in his office. Deponent says that the annexed statement is a true and complete statement from the books of said company relating to the subject matter embraced therein and set forth at the top of said statement; and that the same truly and correctly sets forth the cost of the waterworks of said company and the additions sub-
1066 sequently made thereto.

H. BAYARD HODGE.

Sworn and subscribed to before me this 2nd day of April, A. D. 1902.

W. H. ROTH,
Notary Public.

Commission expires Feb. 27th, 1905.

Affidavit of H. Bayard Hodge.

In the Circuit Court of the United States for the Western Division of the Northern District of Georgia.

COLUMBIA AVENUE SAVING FUND, SAFE DEPOSIT, TITLE & Trust Co.
vs.
CITY OF DAWSON ET AL. } In Equity.

STATE OF PENNSYLVANIA, }
City and County of Philadelphia, } ss:

Before the undersigned, appeared in person H. Bayard Hodge, who being duly sworn deposes and says on oath that he is secretary of the Dawson Waterworks Company and is the keeper and custodian of its records and makes up all records of its receipts and disbursements and the same remain of file in his office in the city of Philadelphia, Penn., and cannot be produced in court without manifest inconvenience, and that the annexed transcript truthfully and correctly sets forth the gross receipts and disbursements of said Dawson Waterworks Company.

(Signed) H. BAYARD HODGE.

Sworn to and subscribed before me this 31st day of May, 1899.

F. X. QUINN,
Notary Public.

[Seal of F. X. Quinn, Notary Public, Philadelphia, Pa.]

1067 *Receipts and Disbursements of Dawson Water Works Crmpany.*

Receipts from all sources, year	1896	1264.55
" " " " "	1897	1349.18
" " " " "	1898	1376.90
" " " " "	1899	670.93
		4661.56

Disbursements.

Year 1896	5169.54
1897	4952.28
1898	5236.59
To 5/12, 1899	2182.75
Total	17,541.17

Receipts and Disbursements of Dawson Waterworks Company, by Years.

Receipts from all sources, except loans:		
Year, 1896	1,264.55	
1897	1,349.18	
1898	1,376.90	
1899	1,276.87	
1900	1,667.08	
1901	1,952.50	
1/1 to 3/31, 1902	636.55	$9,523.63

Disbursements.

Year.	Int. on bonds.	Expenditures.	Total.
1896	2,400.00	2,700.41	5,100.41
1897	2,400.00	2,463.02	4,863.02
1898	2,400.00	2,621.02	5,021.02
1899	1,200.00	2,745.63	3,945.63
1900		2,717.60	2,717.60
1901		2,095.16	2,095.16
1/1 to 3/31, 1902		224.01	224.01
	8,400.00	15,566.85	23,966.85

The account on page 141 of printed record includes items of plant a/c. which are eliminated from above statement.

1068 In the Circuit Court of the United States for the Western Division of the Northern District of Georgia.

COLUMBIA AVENUE SAVING FUND, S. D., T. & T. Company
vs.
CITY OF DAWSON ET AL. } In Equity.

STATE OF PENNSYLVANIA, }
City and County of Philadelphia. }

Before me, the undersigned, appeared in person H. Bayard Hodge, who being duly sworn deposes and says on oath, that he is the secretary of the Dawson Waterworks Company, and is the keeper and custodian of its books and records and makes up all the records of

its receipts and disbursements and the same remain of file in his office. Deponent says that the annexed statement is a true and complete statement from the books of said company relating to the subject matter embraced therein and set forth at the top of said statement and that the same truly and correctly sets forth the receipts and disbursements of said Dawson Water Works Company from January 1, 1896 to March 31, 1902, inclusive, separately stated by years.

H. BAYARD HODGE.

Sworn and subscribed to before me this 2nd day of April, A. D. 1902.

W. H. ROTH,
Notary Public.

Commission expires February 27th, 1905.

1069 *Statement Showing Hydrant Rental Due by City of Dawson under Contract of February 21st, 1890.*

1894.		
Dec. 31.	Balance for year 1894 deducted for taxes.....	$440.00
1895.		
June 30.	Hydrant rental Jan. 1 / 95 to June 30 / 95.....	1000.00
Dec. 31.	Hydraut rental July 1 / 95 to Dec. 31 / 95.....	1000.00
1896.		
June 30.	Hydrant rental Jan. 1 / 96 to June 30 / 96.....	1000.00
Dec. 31.	Hydrant rental July 1 / 96 to Dec. 31 / 96.....	1000.00
1897.		
June 30.	Hydrant rental Jan. 1 / 97 to June 30 / 97.....	1000.00
Dec. 31.	Hydrant rental July 1 / 97 to Dec. 31 / 97.....	1000.00
1898.		
June 30.	Hydrant rental Jan. 1 / 98 to June 30 / 98.....	1000.00
Dec. 31.	Hydrant rental July 1 / 98 to Dec. 31 / 98.....	1000.00
1899.		
June 30.	Hydrant rental Jan. 1 / 99 to June 30 / 99.....	1000.00
Dec. 31.	Hydrant rental July 1 / 99 to Dec. 31 / 99.....	1000.00
1900.		
June 30.	Hydrant rental Jan. 1 / 1900 to June 30 / 1900..	1000.00
Dec. 31.	Hydrant rental July 1 / 1900 to Dec. 31 / 1900..	1000.00
1901.		
June 30.	Hydrant rental Jan. 1 / 1901 to June 30 / 1901..	1000.00
Dec. 31.	Hydrant rental July 1 / 01 to Dec. 31 / 01.....	1000.00
	Total amount due for hydrant rental to 12 / 31 / 1901..	$14440.00

1070	Amount brought forward	$14440.00
	1902.	
April	1. Interest at 7 % on $440.00 1/1/95 to 4/1/02..	223.30
	1. Interest at 7 % on 1000.00 7/1/95 to 4/1/02..	472.50
	1. Interest at 7 % on 1000.00 1/1/96 to 4/1/02..	437.50
	1. Interest *on* 7 % on 1000.00 7/1/96 to 4/1/02	402.50
	1. Interest at 7 % on 1000.00 1/1/97 to 4/1/02..	367.50
	1. Interest at 7 % on 1000.00 7/1/97 to 4/1/02..	332.50
	1. Interest at 7 % on 1000.00 1/1/98 to 4/1/02..	297.50
	1. Interest at 7 % on 1000.00 7/1/98 to 4/1/02..	262.50
	1. Interest at 7 % on 1000.00 1/1/99 to 4/1/02..	227.50
	1. Interest at 7 % on 1000.00 7/1/99 to 4/1/02..	192.50
	1. Interest at 7 % on 1000.00 1/1/1900 to 4/1/02	157.50
	1. Interest at 7 % on 1000.00 7/1/1900 to 4/1/02	122.50
	1. Interest at 7 % on 1000.00 1/1/1901 to 4/1/02	87.50
	1. Interest at 7 % on 1000.00 7/1/1901 to 4/1/02	52.50
	1. Interest at 7 % on 1000.00 1/1/02 to 4/1/02..	17.50
	Total amount of interest on hydrant rental.....	3653.30

Total $18,093.30.

In the Circuit Court of the United States for the Western Division of the Northern District of Georgia.

COLUMBIA AVENUE SAVING FUND, S. D., T. & T. Company
vs.
CITY OF DAWSON ET AL. } In Equity.

STATE OF PENNSYLVANIA, }
City and County of Philadelphia. }

Before me, the undersigned, appeared in person H. Bayard Hodge who being duly sworn deposes and says on oath, that he is the secretary of the Dawson Water Works Company and is the keeper and custodian of its books and records and makes up all the
1071 records of its receipts and disbursements and the same remain of file in his office. Deponent says that the annexed statement is a true and complete statement from the books of said company relating to the subject matter embraced therein and set forth at the top of said statement and that the same truly and correctly sets forth the amounts of hydrant rental owing by the city of Dawson under the contract of February 21, 1890, entered into between the city council of Dawson and R. L. Bennett and his associates, successors and assigns, together with interest thereon calculated to April 1st, 1902. The right to collect said hydrant rentals

being vested in the Columbia Avenue Saving Fund S. D. T. & T. Company.

H. BAYARD HODGE.

Sworn to and subscribed before me this 2nd day of April, A. D. 1902.

W. H. ROTH,
Notary Public.

Commission expires Feb. 27th, 1905.

The complainant then introduced the following checks in evidence:

(On margin: The American Pipe Manufacturing Company, engineers and contractors for water works, Philadelphia.)

No. 1307. PHILADELPHIA, 8/30, 1895.

The First National Bank of Media, Media, Pa.

Pay to the order of Dawson W. W. Co., twelve hundred dollars. $1200.

(Signed) J. W. HAWLEY, *Treasurer.*

(Endorsed on back:) For deposit only to the credit of the Dawson Water Works Co., H. Bayard Hodge, sec'y. The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Co., of Philadelphia, Pa. For coll. and remittance to the Tenth National Bank of Phila., Pa. W. Scott, cashier.
1072

(On margin: The American Pipe Manufacturing Company, engineers and contractors for water works, Philadelphia.)

No. 4088. PHILADELPHIA, 2/26/1896.

The Tenth national bank.

Pay to the order of Dawson Water Works Co., eleven hundred dollars.

$1100.

(Signed) N. B. COX, *Treasurer.*

(Endorsed on back:) For deposit only to the credit of the Dawson Water Works Co. H. Bayard Hodge, sec'y. The Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Co., of Philadelphia, Pa.

(On margin: The American Pipe Manufacturing Company, engineers and contractors for water works, Philadelphia.

No. 654. PHILADELPHIA, PA., *Aug.* 27, 1896.

The Girard Life Insurance, Annuity and Trust Co., of Philadelphia.

Pay to the order of Dawson Water Works Co., one thousand two hundred dollars.
$1200.00 / 00.
(Signed) N. B. COX, *Treasurer.*

(Endorsed on back:) For deposit only to the credit of the Dawson Water Works Co., H. Bayard Hodge, sec'y. Received payment. The Tenth National Bank of Philadelphia, Pa., Walter Scott, cashier. Endorsement guaranteed. The Columbia Avenue Saving Fund. Safe Deposit, Title and Trust Company.

1073 (On margin: The American Pipe Manufacturing Company engineers and contractors for water works. Philadelphia.)

No. 4269. PHILADELPHIA, *Feb.* 27, 1897.

The Tenth national bank.

Pay to the order of Dawson Water Works Co., one thousand dollars.
$1000.00 / 00.
(Signed) GEO. M. BUNTING, *Treasurer.*

(Endorsed on back:) For deposit only to the credit of Dawson Water Works Co., H. Bayard Hodge, sec'y. The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, of Philadelphia, Pa. Endorsement guaranteed. Walter Scott, treasurer.

(On margin: The American Pipe Manufacturing Company, engineers and contractors for water works, Philadelphia.)

No. 4471. PHILADELPHIA, 8 / 30, 1897.

Ten Tenth national bank.

Pay to the order of Dawson Water Works Co., one thousand dollars.
$1000.
(Signed) GEO. M. BUNTING, *Treasurer.*

(Endorsed on back:) For deposit only to the credit of the Dawson Water Works Co., H. Bayard Hodge, sec'y. The Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Co., of Philadelphia, Pa. Endorsement guaranteed. Walter Scott, treasurer.

1074 (On margin: The American Pipe Manufacturing Company, engineers and contractors for water works, Philadelphia.

No. 4576. PHILADELPHIA, 2/25/1898.

The Tenth national bank.

Pay to the order of Dawson Water Works Co. ten hundred and fifty dollars.
$1050.00/00.
(Signed) GEO. M. BUNTING, *Treasurer.*

(Endorsed on back:) For deposit only to the credit of the Dawson Water Works Co. H. Bayard Hodge, sec'y. The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Co., of Philadelphia, Pa. Endorsement guaranteed. Walter Scott, treasurer.

(On margin: The American Pipe Manufacturing Company, engineers and contractors for water works, Philadelphia.)

No. 1811. PHILADELPHIA, *Aug.* 27, 1898.

The Girard Life Insurance, Annuity and Trust Co.

Pay to the order of Dawson Water Works Co., one thousand dollars.
$1000.00/100.
(Signed) GEO. M. BUNTING, *Treasurer.*

(Endorsed on back:) For deposit only to the credit of the Dawson Water Works Co. H. Bayard Hodge, sec'y. The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Co., of Philadelphia, Pa. Endorsements guaranteed. Walter Scott, treas. Received payment the Tenth national bank, of Philadelphia, Pa. Walter Scott, cashier. Endorsement guaranteed.

1075 (On margin: The American Pipe Manufacturing Company, engineers and contractors for water works, Philadelphia.

No. 2589.

PHILADELPHIA, 2/28/1899.

The Girard Life Insurance Annuity and Trust Co. Pay to the order of Dawson Water Works Co., ten hundred and ten dollars. $1010.00/100.
(Signed) GEO. M. BUNTING, *Treasurer.*

(Endorsed on back:) For deposit only to the credit of Dawson Water Works Co. H. Bayard Hodge, sec'y. The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Co. of Philadelphia, Pa. Endorsements guaranteed. Walter Scott, treas. Received payment, the Tenth National Bank of Philadelphia, Pa. Walter Scott, cashier. Endorsement guaranteed.

Complainants introduced the following letters:

Office of Columbia Avenue Saving Fund, Safe Deposit, Title & Trust Co.

PHILA., *April 5th*, 1899.

To the city of Dawson, Georgia, and mayor and council of said city of Dawson.

GENTLEMEN: We send you herewith enclosed a copy of a resolution passed by the Dawson Water Works Company. In accordance with said resolution, and by virtue of the contract under which the said Dawson Water Works Co. has furnished and is furnishing water for fire protection, we hereby notify you to pay the hydrant rentals due for said fire protection for the year- 1896, 1897, 1898 amounting in the aggregate to the principal sum of six thousand ($6000) dollars; that is to say, $2000 for each of said years; to the un-
1076 dersigned as trustee for the bondholders of the Dawson Water Works Company.

You are also notified that in future all hydrant rentals as they become due under the aforesaid contract contained in the ordinance passed and formed by said city of Dawson February 21st, 1890, must be paid to the undersigned trustee, and not to the Dawson Waterworks Company.

Yours very truly,

COLUMBIA AVENUE SAVING FUND, SAFE DEPOSIT, TITLE AND TRUST CO.

S. A. LEITH, *Vice-President.*

Attest: WALTER SCOTT, *Secretary.*

[Seal of the Columbia Avenue Saving Fund, S. D., T. & T. Co.]

PHILADELPHIA, PA., *February* 3, 1902.

Mr. J. A. Horsley, supt., Dawson, Ga.

DEAR SIR: Answering your recent favor regarding the possibility of the erection of a covering over standpipe, would state that we have contracted with the Tippett and Wood to put a covering on this pipe as soon as they complete the erection of a standpipe at Greenville, Ala. It will probably be about two months before they reach your city to do this work. You can assure any persons making inquiry that the water company have contracted to complete this work. If, however, you desire to have a covering put on earlier than this date you might obtain a bid from some local contractors for the erection of a cone shaped roof, consisting of rafters covered with good pine boards with an ornamental finial block four or five feet in height on the summit. This roof would be constructed similar to the roof on the old tank. I should think
1077 you could get some local people to do this at a reasonable figure. Please get the bid and let me have it within a few

days and we could probably countermand the order with Tippett and Wood and turn it over to the local contractor and thus get the work completed that much earlier.

Yours truly,

DAWSON WATERWORKS COMPANY.
J. H. DAWES, *General Sup't.*

The affidavit of Penrose D. Curtis, introduced in evidence, by consent, in lieu of his oral testimony, and to have the same force and effect and no more than if the witness had so testified on the stand.

STATE OF PENNSYLVANIA, }
County of Delaware, } *ss:*

Before the undersigned appeared in person Penrose D. Curtis, who being duly affirmed, deposes and says on affirmation, that he is the holder and owner of two bonds of the Dawson Water Works Co., of the face value of $1000., being bonds numbers 5 and 51, and the original bonds being herewith shown.

Deponent purchased said bonds in the open market for value. Deponent purchased said bonds in good faith in the belief and on the assurance that the contract between the Dawson Water Works Co. and the city of Dawson was a legal, valid and binding contract and would be carried out in good faith on the part of the city of Dawson.

Deponent has no connection with the American Pipe Mfg. Co. and no connection with the Dawson Water Works Co., except as a creditor thereof by reason of holding and owning said bonds.

1078 Deponent collected his interest on said bonds from the trustee from time to time as said interest fell due, and had no knowledge whatever that any litigation was pending between the Dawson Waterworks Co. and the said city of Dawson; and no knowledge whatever that the validity of the contract between said Water Works Co. and the said city of Dawson had ever been brought in question until within the last few weeks.

(Signed) PENROSE D. CURTIS.

Affirmed and subscribed to before me this 31st day of May, A. D. 1899.

IDA J. BAKER,
Notary Public.

[Seal of Ida J. Baker, Notary Public, Media, Del. Co., Pa.]

It was agreed that there should be added to the above affidavit the following after the words "in the belief and on the assurance," *on the part of the seller.*

Affidavit of H. E. Hooper, Bondholder.

STATE OF PENNSYLVANIA, } ss:
County of Delaware, }

Before the undersigned appeared in person Homer E. Hooper, who being duly affirmed, deposes and says on his affirmation, that he is holder and owner of four bonds of the Dawson Water Works Co. of the face value of $2000, being bonds Nos. 46, 58, 59, 60, and the original bonds being herewith to the court shown.

Deponent's father purchased said bonds in the open market as deponent is informed and believes. Deponent inherited said bonds and is now the owner of them.

Deponent has no connection with the Dawson Water Works Co., exept as a creditor thereof by reason of holding and owning said bonds. Deponent collected his interest on said bonds from
1079 the trustee from time to time as said interest fell due; and had no knowledge whatever that any litigation was pending between the Dawson Water Works Co. and said city of Dawson; and no knowledge whatever that the validity of the contract between said Water Works Company and said city had ever been brought in question until within the last few weeks.

(Signed) H. E. HOOPER. [L. S.]

Affirmed and subscribed to before me this 31st day of May, A. D. 1899.

IDA J. BAKER,
Notary Public.

[Seal of Ida J. Baker, Notary Public, Media, Del. Co., Pa.]

Identified:

W. A. WIMBISH,
Master in Chancery.

Filed in clerk's office 27 April, 1903.

O. C. FULLER, *Clerk,*
By N. A. BROWN, *Deputy.*

1080 *Affidavits of George Callaway.*

To the Hon. W. A. Wimbish, master:

The defendant The City of Dawson, respectfully represents that since the closing of the testimony and the argument before the master, this the respondent has casually discovered new and material evidence and which it could not have discovered by the exercise of that standard of diligence required in such cases, and for

the purpose of exhibiting to the master the nature and value of said evidence, the respondent hereby sets forth by a copy thereof, an original affidavit made by George Callaway, a reputable witness, on May 22, 1902, to-wit:

"In person came George Callaway who on oath says that he did this day climb to the top of the water tower of the Dawson Waterworks Company in Dawson, Ga., and that he did find and remove from the water in said tower, three frames of large birds which he believes confidently to be the frames of buzzards, but which were so badly decayed that he cannot possibly state to which species of bird they belong."

(Signed) GEORGE CALLAWAY."

Sworn to and subscribed before me this May 22nd, 1902. In the presence of

M. M. LOWREY,
Notary Public, Terrell County."

Respondent therefore now prays the master for leave to reopen the evidence in said case upon the issue duly made therein as to whether said waterworks company had performed and was performing its alleged contract by furnishing to the city of Dawson and the inhabitants thereof, such quality and kind of water as is required by the terms of said alleged contract and as claimed by the plaintiff in said bill.

Respondent prays that some suitable and convenient
1081 day to the master and the parties and their counsel, be made by the master for taking the testimony of the said Callaway as indicated in said affidavit, so that the same may be duly considered as a part of the evidence of respondent in said cause.

J. A. LAING,
GUERRY & HALL,
Sol's for City.

Filing: Filed May 29th, 1902.

W. A. WIMBISH,
Master in Chancery.

Filing: Filed in clerk's office Apr. 27, 1903.

O. C. FULLER, *Clerk,*
By N. A. BROWN,
Deputy Clerk.

(Original affidavit not with papers. Clerk.)

Affidavit Geo. Callaway.

GEORGIA, }
Terrell County. }

Personally comes George Callaway who on oath deposes and says that he was sent to the top of the water tank of the waterworks company in Dawson, Ga., by the supt. J. A. Horsley, and that he then and there removed out of said tank only one buzzard, this being on the 22nd day of May, 1902.

Deponent also assisted said superintendent in removing all of the water in said tank immediately after said buzzard was found.

GEO. CALLAWAY.

Sworn to and subscribed before me this June 3rd, 1902.

R. E. BELL, [SEAL.]
N. P., Terrell County, Georgia.

Identified. W. A. W.

Filing: Filed in clerk's office Apr. 27, 1903.

N. A. BROWN,
Deputy Clerk.

1082 UNITED STATES OF AMERICA, }
Northern District of Georgia, Western Division. }

I, Olin C. Fuller, clerk of the United States circuit court in and for the northern district of Georgia, western division, in the fifth circuit, do hereby certify that the foregoing pages numbered from 1 to 1081 inclusive, bound in two volumes, contain a true, full, correct and complete transcript of the record and proceedings had in said court in the cause wherein The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company was complainant, and The City Council of Dawson, W. B. Cheatham, J. G. Dean, J. S. Lowrey, Charles Deubler, F. M. Jennings, F. Nasworthy, F. M. McNulty, A. J. Baldwin, John Seay, and Dawson Water Works Company, were respondents, as appears of record and now remaining of file in my office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of Columbus, in the northern district of Georgia, western division, in the fifth circuit, this 18th day of November, in the year of our Lord one thousand nine hundred and three.

[Seal U. S. Circuit Court, West'n Div., N. D., Georgia.]

OLIN C. FULLER, *Clerk.*

Endorsed on cover: File No. 19,152. N. Georgia C. C. U. S. Term No. 154. The City of Dawson, appellant, *vs.* The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company. Filed December 5", 1903. File No. 19,152.

(19,152.)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 154.

THE CITY OF DAWSON, APPELLANT,

vs.

THE COLUMBIA AVENUE SAVINGS FUND, SAFE DEPOSIT, TITLE AND TRUST COMPANY.

BRIEF IN BEHALF OF APPELLANT.

SUMMARIZED NARRATIVE.

On June 11, 1886, the city of Dawson, in the State of Georgia, submitted to its voters the question as to whether the expense of waterworks should be incurred. The ordinance and notice failed to specify the amount of debt proposed, as required by law. More than two-thirds of the voters cast their ballots in favor of the expense, and the result was declared July 18, 1886. Thereupon, the city officials made some attempts to secure a system of waterworks, but with no definite results.

About four years later, the then city council entered into the contract with R. L. Bennett which forms the basis of this suit. Neither in the negotiations leading thereto nor in the contract was there any reference to the election as

the authority thereof, or as an inducement thereto. This contract was in the form of an ordinance adopted February 21, 1890, and was in substance as follows (pr. rec. 288):

> R. L. Bennett, his associates, successors, and assigns, who were to be incorporated as the Dawson Waterworks Company, were granted the exclusive right for ninety-nine years to construct, maintain, and operate a complete and thorough system of waterworks for the purpose of supplying the city and its inhabitants with water for protection against fires and for domestic, sanitary, and other useful purposes. The exclusive right and privilege of excavating and laying water pipes and mains along the streets of the city was also conferred, as well as the right to erect necessary buildings, tanks, etc.
>
> The reservoir was required to be of not less than forty thousand gallons' capacity and of sufficient height to produce such pressure on the mains that from any hydrant on the principal streets a stream of water would be projected in still air fifty feet high, through one hundred feet of fire hose and one-inch nozzle, and the company was required to continue during its existence, to furnish a sufficient supply of water for the purposes named, unless prevented by unavoidable and providential cause, in which event it should be allowed a reasonable time within which to make repairs, after which, should it fail to furnish such supply of water, its franchise from that fact should be forfeited.
>
> The company was required to enlarge its system from time to time to meet the increased demands consequent upon the growth of the city.
>
> In consideration of guarantee by the company that the city would have for twenty years, and as long thereafter as the company should operate the waterworks, a free and unrestricted use of water for fire protection, and fire plugs of approved pattern at convenient places, the city obligated itself to pay to the water company, or to such trust company as the water company might elect as trustee for its bonds, the sum of $2,000 annually for twenty years, payable in semi-annual instalments, and the city was re-

quired to make provision each year for the payment of the stipulated rental by a tax levy.

In consideration of the agreement by the water company to furnish public municipal buildings and fountains with water, the city obligated itself to remit such license fees and taxes as might thereafter be assessed by the city against the water company.

Assent was given by the city to the charter that might be obtained by the water company, conferring upon it the exclusive franchise to construct, maintain and operate a system of waterworks in the city.

It was provided that the provisions of the ordinance should be mutually binding upon the city and R. L. Bennett, and associates, and the company to be organized by them.

This ordinance was accepted by R. L. Bennett and constituted the contract between him and the city. On March 17, 1891, the contract was assigned by Bennett to the American Pipe Manufacturing Company, which, on August 20, 1891, assigned the same to the Dawson Waterworks Company, which had become incorporated.

On June 27, 1894, the then city council passed a resolution declining to carry out the contract.

On October 4, 1894, the city council ordered an election to determine whether bonds should be issued to the amount of $35,000, to erect waterworks and provide electric lights for the city. The election was held December 12, 1894, and the result was in favor of the issuance of bonds, and $10,000 of said bonds were issued and sold and the proceeds used in erecting an electric plant. The remainder of the bonds has not yet been disposed of, the city having been subsequently restrained by order of the court in this cause.

In December, 1894, in pursuance of resolution of the city council, the mayor notified the water company that unless a new agreement was reached the city would not be bound by the contract after January 1, 1895. In pursuance of said

resolution the city refused to pay the water rental for 1895. The water company brought suit in the Superior Court for Terrell County, Georgia, for the 1895 instalments, claiming that the contract was valid and binding for twenty years, and that it had earned the rental for said year. The city pleaded that it had not used the water; that the water was unfit for use, and contended that the contract was not binding as alleged, because the debt created thereby was contrary to the inhibition of the State constitution, the mandatory requirements of law not having been complied with. The Superior Court directed a verdict for plaintiff, and thereupon the city excepted, and the cause was carried on appeal to the Supreme Court of Georgia.

The cause was argued and reargued before said court, which, on March 14, 1899, rendered an exhaustive decision (106 Ga. 696–737), reversing the court below and sustaining the contention of the city, and holding in substance as follows:

> 1. Without preliminary sanction of a popular vote, as required by the constitution, a municipal corporation can not contract for a supply of water, on the credit of the city, for a longer period than one year; and a contract, which by its terms is to run for twenty years, each year's supply to be paid for semi-annually, is operative from year to year, so long as neither party renounces or repudiates it.
>
> 2. Even if no legislation is necessary to authorize a municipal corporation to hold an election to determine whether a debt other than a bonded indebtedness shall be incurred, an election held pursuant to an ordinance and notice which do not state the amount of debt to be incurred, will not be sufficient to authorize a contract incurring an indebtedness.
>
> 3. Where one enters into a contract with a municipal corporation which is void because opposed to the constitution and laws of this State, and contrary to its settled public policy, complete performance on the part of such person will not prevent the municipal corporation from pleading its want of power, or the illegality of the contract.

4. The city has the right to make a contract for water supply for one year, provided it has in the treasury a sufficient sum to pay therefor, or if such sum can be secured by lawful taxation levied during the year in which the contract is made. While a contract for a longer period is illegal, yet where the other parties to such a contract have complied with their part, the city is liable for the amount stipulated in the contract for each year that it received the benefits thereof.

Complainant's Bill.

On May 1, 1899, less than two months after the decision of the Supreme Court, the Columbia Avenue Savings Fund, Safe Deposit, Title and Trust Company, a Pennsylvania corporation, through the same counsel who had represented the waterworks company, filed a bill in the Circuit Court of the United States for the Fifth Circuit against the Dawson Waterworks Company, the city of Dawson, and certain individuals in their representative capacity as officers of said city. The bill alleged in substance as follows (pr. rec. 1):

> That on September 1, 1891, the Dawson Waterworks Company created complainant trustee for its first mortgage bonds, covering $40,000, the deed of trust conveying as security the real and personal property, rights, franchises, etc., and in particular the income payable to said company or to the trustee of its bondholders by virtue of the contract with the city of Dawson; that the bonds were dated September 1, 1891, and payable September 1, 1916, and had been sold to procure the money to construct the system of waterworks in the city of Dawson.
>
> The contract contained in the ordinance of February 21, 1890, was alleged, cited, and described, as well as the election of 1886. That the water company had constructed a system of waterworks in accordance with the requirements of said contract; that the system had been tested and found to be satisfactory; that the city had, on August 12, 1891, by resolution, accepted the system as complying with

the contract; that the water company had continued to maintain and operate the system in compliance with the contract, and that the city had continuously enjoyed the fire protection provided thereby.

That it was understood by the city when it made the contract that the money required to construct the waterworks was to be procured in whole or in part by the issue of bonds of the water company, and to make them more salable the city had agreed to pay to the trustee for the bondholders the annual rental stipulated in the contract, thus inviting investors to purchase the bonds upon the faith that the city would observe its obligation.

That after using the water without complaint for several years the city council, on June 27, 1894, adopted a resolution declining to further carry out its contract, assigning as the reason therefor that the contract created an indebtedness forbidden by the constitution of the State, and was, therefore, not binding upon the city; that the water company had in no way failed to comply with its contract; that at the time the resolution was adopted the city was considering the purchase of the waterworks, and it was its purpose in repudiating the contract to destroy the value of the property by withdrawing the revenue necessary to its existence, thereby forcing the company to sell at such a price as would be satisfactory to the city; that in pursuance of this scheme an equitable petition was filed in the State court by certain taxpayers against the city and the water company, seeking to enjoin the city from paying the rentals accruing under the contract on the ground that the contract was void under the constitution and laws of Georgia. The petition was denied. It was charged that the suit was instituted at the instance of the city.

That since December 31, 1894, the city had refused to pay or make any provision for the payment of water rentals under the contract which it had prior to that time recognized; that in December, 1894, the city council, through its mayor, notified the water company that a resolution had been adopted declaring that the city would not be liable

on the contract after January 1, 1895; that the city had continuously, since January 1, 1895, availed itself of the fire protection afforded by the water system, thereby taking the benefits, though declining to carry out the obligations of the contract; that the public ordinances providing for the use of the water by the fire department had never been repealed, nor had the department been forbidden to use the water; that no other means of fire protection had been provided by the city; that apparatus had been furnished the city fire department for using the water, and members of the fire department were given tax exemptions in consideration of their services; that the mayor and members of the council, as well as other citizens, had subsequently assisted in the use of water at various fires.

That the water company declined to acquiesce in the repudiation of the contract by the city, and gave notice that it would continue to furnish water with the required pressure, for fire protection; that it had observed the requirements of the contract; that notwithstanding the water company had at all times held itself in readiness to furnish water for municipal buildings and fountains, the city had assessed and attempted to collect taxes for the year 1895.

That it was the purpose of the city to sell bonds and erect its own system of waterworks and dispense with the fire protection afforded under the existing contract; that it was the city's plan to repudiate the contract, but nevertheless to continue to use the water until such time as it should sell its bonds and erect its own waterworks; that the Supreme Court of Georgia having decided that the contract between the city and the water company was void, the city was engaged in an effort to sell its bonds for the purpose of erecting a system of waterworks in violation of its contract and in destruction of the rights of the water company and the holders of its bonds.

That the water company had no property except its plant and the value of said contract, the abrogation of which would result in almost complete destruction of the value of its property, as the company would be in no position to compete suc-

cessfully for the patronage of private consumers.

That the water company, recognizing complainant's duty to the bondholders, had (since the said decision of the Georgia Supreme Court) yielded to complainant's demand that in future it should have the exclusive right to collect from the city of Dawson all rentals accruing under the contract for the year 1896, and subsequent years, and the city had been notified thereof.

That the bonds of the water company had been first sold to the American Pipe Manufacturing Company, which in turn sold them in open market, and the same are now held by different persons; that said pipe manufacturing company is engaged in the construction of waterworks, and frequently receives payment in bonds, and consequently has frequent occasions to sell such bonds, and is therefore interested in seeing that the obligations thereof are duly protected; that said pipe manufacturing company had paid all the interest due on the bonds from January 1, 1896, to March 1, 1899, inclusive, as the water company could not do so, because of the failure of the city of Dawson to pay the rentals during said years; that said pipe manufacturing company was unwilling to advance further sums, and had called upon complainant, as trustee, to demand and collect the rentals from the city of Dawson, so as to enable the pipe manufacturing company to recover the interest advanced.

The bill prayed that the city be enjoined from erecting, operating, using, etc., any system of waterworks other than those of the water company for fire protection, or from entering into any other contract with reference to any other water system, or for supply of water for fire protection, or from selling bonds for any such purpose in violation of said contract with the Dawson Waterworks Company, and from collecting any city tax or license fees from said company. Also that the contract be declared valid and binding upon the parties, and that the same be specifically enforced, and that complainants recover all rentals due, with interest.

Defendants' Demurrer and Answer.

The court having granted a restraining order and rule *nisi*, the defendants for cause filed objections to the jurisdiction of the court, in substance as follows (pr. rec. 40, 51, 53, and 60):

That the Dawson Water Company, a Georgia corporation, was the real complainant in said bill, which was fraudulent and collusive, and filed since the rendition of the judgment by the Supreme Court of Georgia in the case of said water company *versus* the city of Dawson, declaring that the contract between the parties was void; that the bill was filed in the name of the present complainant, under the newly created right of action, for the purpose of avoiding the judgment of said Supreme Court, which was conclusive as to all questions raised; that under the allegations of the bill there was no jurisdiction.

Whereupon the defendants prayed that the court proceed no further, but dismiss the bill for want of jurisdiction.

For further cause defendants charged that there was no equity in the bill; that the only right of action alleged was one at law to recover rentals; that the allegations in the bill showed only a contract which was void, and had been declared so, and that there was no contract at all between complainant and defendants.

That the contract between the company and the city was void *ab initio*, because the city had no power to make such a contract as alleged; that on the 14th day of March, 1899, the Supreme Court of Georgia, in the case of the Dawson Water Company *vs.* the City of Dawson, in a suit for alleged rentals under said contract for the year 1895, had decided that under the constitution and laws of the State of Georgia, and its settled policy, this very contract was *ab initio* void.

Wherefore defendants said that all questions now raised by complainants were *res judicata*.

For answer defendants denied that the city had entered into the alleged contract with the full

knowledge and free assent of its inhabitants. They charged that the notice and resolution for the election on said water contract were void for uncertainty and had been so declared by the Supreme Court; that when said election was called and held, neither the said R. L. Bennett nor the waterworks company, nor said contract had ever been contemplated by the voters of the city or by its officials; that the votes at said election were cast in the belief that the city proposed either to build or buy waterworks; that the so-called contract with R. L. Bennett was undertaken without regard to said election and without any sanction by the electors of the city and without any opportunity of sanction by them.

They denied that the inhabitants of the city had accepted the contract as the act of the city, or that the same had been acquiesced in by every one; they charged that there had been objection to the contract from the beginning, which had grown with the experience of the people with said contract until it had ripened into litigation.

They admitted that the city had accepted the waterworks at the time as meeting the requirements of the contract, but charged that their fitness and efficiency was of short duration, while the contract required that they should be continuous; they denied that the waterworks company had carried out its contract since the acceptance of the system.

They admitted payment by the city of the rentals prior to the year 1895; they admitted renouncing the contract in June, 1894, as illegal and exorbitant, but alleged that the city was desirous of doing what was right by the water company, and just and best for the people of the city, and negotiated for a fair and legal contract with the company; that the company treated its overtures with ridicule; that since then the city had not recognized the contract, and that no official, as such, has used the water since January 1, 1895; they denied any effort to force the company to sell its system to the city.

They charged that the water system was and had been during all the years mentioned, defective, insufficient, unreliable and almost unserviceable as a

means for protecting the city from fire; that the required amount of pressure had not existed during this time; that the system had not been kept in proper condition, and that the works were and had been unsatisfactory and had almost entirely failed of results on occasions of fires; that the system was worse than worthless to the city, for instead of being a protection, its existence, and the litigation connected therewith, had prevented and was preventing the construction of adequate and sufficient works; that during all these years the company had notice and knowledge of the inefficiency of said system, and on one occasion, in June, 1897, after the system had failed to be of service in preventing the burning of the Whitehard and Green houses, by agreement several citizens and J. A. Horseley, superintendent of the system, the next day made a test, being furnished with 100 feet of new and clean hose and one inch nozzle, as provided by the contract, and the pressure failed to throw the water vertically in still air more than thirty feet; that in and since 1894 there had been no substantial deterioration or improvement in the system.

That the contract alleged for remission of taxes was void, and had been so declared by the Supreme Court of Georgia; that the city had not used the water under the terms of the so-called contract, and that the taxes assessed against the water company for 1895 and subsequent years were unpaid.

That the city had the right to build, or buy, and operate waterworks upon complying with the requirements of the State constitution.

That complainant had failed to assert any right to collect water rentals or to give notice to the city of its intention to do so, and had allowed the water company to collect the rentals prior to the year 1895, and to litigate for the rentals for said year as sole claimant thereof, until it had reached an adverse decision, when the Supreme Court of the State adjudged the contract null and void, and all questions now raised having been decided adversely, it was too late for complainant, as subsequent transferee, to litigate the same question in a different jurisdiction.

Defendants charged that the water company did not and could not, under the constitution and laws of Georgia, have such an exclusive franchise as alleged by complainant; that the city, its property owners and inhabitants, had been and were being greatly damaged by the existence of the present system and the continued litigation by the water company and its privy, the complainant; that according to complainant's bill, the water company was insolvent and could not improve and repair its system so as to satisfy the requirements of the city, and notwithstanding that fact, the said company, through complainant, was stubbornly insisting on the enforcement of the so-called contract, requiring exorbitant payments for next to worthless service.

Amendments to Bill and Answer.

The court heard the rule on June 9, 1899, and on June 27, 1899, before a decision was rendered, the complainant amended its bill, setting up a Federal question, and alleging in substance as follows (pr. rec. 36, 51):

That notwithstanding the bonds of the water company were marketed on the faith of said contract, and that the water system had been erected at great expense, and the company had complied with the conditions of the contract, the city had, by ordinance and conduct, attempted to impair the obligations of said contract and that its action was in destruction of the security of the bondholders under the contract, and protection thereof guaranteed by the Constitution of the United States; that the city had attempted to violate the obligation of said contract, contrary to the Constitution of the United States, which prohibits any State from passing any law impairing the obligations of contracts, and, under the color of authority given it by the charter, the city had not only adopted such ordinance, but was proceeding to carry the same into effect.

That the wrongful conduct of the city in refusing to be bound by the obligations of the contract, and to destroy without compensation the property values

dependent upon the exclusive franchise guarantee by said contract, and its threat to erect a rival system of waterworks, would have the effect of depriving the bondholders of their property without due process of law, contrary to the protection guaranteed by the Constitution of the United States.

That after the decision against it by the Supreme Court of Georgia, the water company had notified complainant that it would take no steps to collect the water rentals accruing after January 1, 1896, or looking to the enforcement of the contract and the protection of the bondholders, and that said company was without means to pay the instalments of interest and could not now make necessary repairs and improvements.

The defendants answered the foregoing amendment in substance as follows:

They denied the allegations of the bill as amended and reiterated that the suit was collusive and instituted to evade the decision of the State Supreme Court; that the water company had constantly demanded payment of the rentals in its own right, without notice or intimation that complainant had any right to collect the same; that upon the promulgation of the decision of the Supreme Court of Georgia, the waterworks company (who was the real complainant), and also the superintendent of the company, had declared that litigation had just begun, and they would now enforce their alleged rights in the United States courts.

That the water company had failed from the year 1895 to the year 1899, inclusive, to carry out its contract, and had left the property of the city of Dawson at the mercy of fires during all that period.

That the defendants had passed no ordinance in impairment of any valid contract, and had made no contract, and had done no act tending to destroy property without due compensation therefor; they admitted holding an election to authorize a bond issue, the proceeds of which would be applied to the erection of waterworks.

They denied any contractual relation with the complainant and admitted having never complained about the waterworks to the complainant, because the city never knew or suspected that it was the lawful guardian of the water company, and therefore entitled to notice.

The cause was heard, and thereupon, on September 16, 1899, the court granted an order for an injunction *pendente lite*, with leave to the defendants to apply to the court, after thirty days, for a test of the ability of the water company to perform its obligations under the contract. From this order the city prosecuted an appeal to the Circuit Court of Appeals, which court, without regard to the merits of the controversy, dismissed the appeal on the ground that an appeal would not lie to that court from an order granting an interlocutory injunction in a case involving the application of the Constitution of the United States (Dawson *vs.* Columbia Avenue, 102 Fed. 200).

On July 8, 1901, after argument, the circuit court overruled defendants' demurrer, holding the law and equity to be with the complainant.

On December 2, 1901, by consent, the cause was referred to W. A. Wimbish, Master in Chancery, to hear evidence and make report on all matters in issue. The material portions of the testimony will be referred to in the "Specification of Errors" and in the "Argument," *infra*.

REPORT OF THE MASTER.

The hearing took place in March and April, 1902. The complainant and the city of Dawson appeared and were represented by counsel, but there was no appearance for the water company. After argument the Master submitted his report, which was in substance as follows (pr. rec. 77):

Findings of Fact.

1. That the result of the election of June 11, 1886, was not in contemplation of the parties to the con-

tract made in 1890, between the city of Dawson and R. L. Bennett, and therefore constituted no authority for the city to enter into said contract; that the contract was made without reference to said election, and was not induced thereby.

2. That the contract was, in substance, *as stated, supra*, in this narrative, and the water company had become transferee thereof, as also stated.

3. That the city of Dawson had express notice that bonds were to be issued to construct the waterworks.

4. That the city designated and accepted the source of water supply.

5. That after completion the system was tested by the city, and by formal resolution was accepted as coming up to the requirements of the contract.

6. That the water company issued bonds aggregating $40,000, giving mortgage to complainant as trustee, as alleged in complainant's bill; that the issue of bonds was accepted by the American Pipe Manufacturing Company in payment for construction of the works; that the bonds were subsequently sold to bona fide purchasers at prices varying from 92½ to 100, the aggregate derived amounting to $37,927.23; that the waterworks, after acceptance by the city, were operated for several years to the mutual satisfaction of the parties, during which time the city paid the rentals as they fell due, and appears to have made no complaint either with reference to the quality or quantity of the water or the efficiency of the service; that in May, 1894, the city opened negotiations looking to the purchase of the system, and the result was a failure to agree; that on June 27, 1894, the city renounced the contract because *ultra vires*, and appointed a committee to make such arrangements as would be satisfactory to the city and the waterworks company; that the water company declined to acquiesce in the abrogation of the contract; that on December 14, 1894, the city notified the company that unless a new agreement was reached as to subsequent use of the water, it would not be liable under the contract after January 1, 1895; that the

water company declined to enter into a new agreement and notified the city that it would continue to perform the requirements of the contract; that in 1895 the company continued to furnish water for the use of the city; that the system of the company was only used at one fire during said year; that since that time the water had been used on occasions of numerous fires, and the city officials participated in the use of the water, claiming that they were not acting in their official capacity, but as private citizens in emergencies, their acts being unauthorized by the city; that the city fire department was maintained since 1894, as it had been in preceding years, and the city continued to furnish fire apparatus to the fire department, and to grant tax exemptions to the members thereof; that no other means of fire protection was afforded by the city, and it did not forbid the use of the water by the fire department and must have known that it was being used; that notwithstanding the repudiation of the contract, the city had continued to enjoy the fire protection afforded by the water company, as it did prior to repudiation.

8. (This finding relates to the quality of the water furnished, and is quoted in full in the specification of error No. 26, *infra*.)

9. (This finding relates to pressure, and is quoted in full in specification of error No. 26.)

10. That for three and a half years prior to the repudiation of the contract, the water supply was taken from the source designated and approved by the city, and during these years the surface washings flowed into the stream during times of rain, and on such occasions the water was muddy; that there was no requirement by the city for the water company to protect the water shed, nor was there any requirement that the water be filtered, or that the tower be increased in height or capacity; that the city predicated its right to renounce the contract upon the want of authority in the preceding administration to bind the city, and because it regarded the contract as unfair and exorbitant; that the evident purpose of the city was to either purchase the works at a

price satisfactory to it, or to make a new agreement on more favorable terms, or to construct and operate its own system; that, failing to agree with the company, the city proposed to issue bonds and construct its own *waterworks*.

11. That during the years succeeding 1895 the only water furnished by the company for municipal buildings was through one opening. No water was supplied for fountains, none having been maintained by the city.

12. That the city levied an *ad valorem* tax on the water company for the year 1895, but the tax had not been paid by the company.

13. That no application had been made by the city to test the water system, as provided by order of the court of September 16, 1899.

14. That subsequent to the date of the decision of the Supreme Court of Georgia, in the case of the Waterworks Company *vs.* City of Dawson, the company had assigned to complainant the exclusive right to demand and collect the water rentals.

15. That the revenues of the water company from and including the year 1895, exclusive of rentals claimed to be due by the city, had been insufficient to pay the operating expenses and fixed charges.

16. That the American Pipe Manufacturing Company had loaned to the water company from time to time funds to meet the accruing interest on the bonds of the water company, from September 1, 1895, to March 1, 1899, aggregating $8,560; that the water company had paid said interest to the complainant; that the transaction between the pipe company and the water company was merely a loan from the former to the latter, and there was no express agreement that the former should be subrogated to the rights of bondholders in the interest coupons.

17. That the complainant was without notice of litigation between the water company and the city of Dawson until after the decision of the Supreme Court of Georgia, dated March 14, 1899.

Conclusions of Law by the Master.

I.

That the only effect of the transfer by the water company to complainant of the right to collect the rentals, in so far as concerns the want of jurisdiction, was to create the diversity of citizenship necessary to a suit in the Federal court; but since in this case a Federal question sufficient to independently sustain the jurisdiction was presented, it was immaterial to inquire what motive prompted the water company to make the assignment to complainant; that the court, in overruling defendants' demurrer for want of equity, adjudicated the right of complainant to maintain its suit.

II.

1. That the plea of *res judicata* had no application because complainant was not privy in right and estate to the water company in the State court suit as to be conclusively bound thereby, since a mortgagee is privy in estate to a mortgagor only as to the actions begun before the mortgage was given.

2. That this court was not bound to follow the decision of the Supreme Court of Georgia, declaring the contract in question to be void, because a debt was thereby incurred within the inhibition of the State constitution, but should exercise its independent judgment in regard to the contract, because there had not been such a settled course of judicial decisions in Georgia, on the question, at the time of the making of the contract as to constrain the courts of the United States to follow the later decisions of the State court. (In reaching this conclusion the various decisions of the Supreme Court of Georgia on the question of inhibited indebtedness were cited and construed, the Master disagreeing with the conclusion of the Supreme Court in Dawson Water Company *vs.* City of Dawson, as to the force, effect, and consistency of the various decisions of said court, rendered prior to the date of the contract in question. The Master's analysis will be considered in the argument which is to follow, under "Stare Decisis."

3. That, contrary to the decision of the Supreme Court of Georgia, he found that the contract in question did not create a debt within the meaning of the State constitution, and that the question was not an open one in this forum, citing the case of Walla Walla *vs.* Walla Walla Water Co., 172 U. S. 1, as conclusive; that the contract contemplated that the water company should maintain and perform specified service for a period of twenty years, and the city was obligated to pay $2,000 per annum for the service; that if the water company should fail to perform the service, the city would be under no obligation to pay; that in no event was it liable to pay any instalment for service until the service had been rendered.

4. That the grant of franchise to the water company was in consideration of the performance of a public service, and after performance by the grantee became a contract protected by the Constitution of the United States; that as an incident to the principal undertaking the city had power to grant to the company the use of its streets and the exclusive right to supply the city and its inhabitants with water; that while the contract did not in terms express an agreement that the city would not, during the twenty years it contracted to take water, erect its own system for the purpose of supplying the inhabitants with water, yet such was the fair implication and reasonable intendment of the contract; that it was unnecessary to decide whether the grant of the exclusive franchise for ninety-nine years was valid; that the city, having induced the expenditure of money on the face of the promise that it would grant the exclusive use of the streets for pipes and mains by the water company, and having contracted to pay for the use of the water for fire protection for twenty years, would not be permitted in equity to disregard its agreement by entering into competition with the water company before the expiration of the contractual term.

5. That during periods of continuous rainfall the water supply was muddy and to some extent contaminated by surface washings; that at times the reservoir leaked, and the required pressure was not

at all times maintained; that the quality of the water was the same as it had been during the years the city accepted it as satisfactory; that the water shed and its condition was substantially the same then as now; that the contract did not require the water to be other than that furnished in its natural state from the designated source of supply; or that it should be filtered or otherwise rendered fit for domestic use; that prior to the repudiation of the contract no complaint as to the pressure or quality of the water had been made, nor had objection of any kind been presented; that no complaint had been made until the filing of defendants' answer, and within a reasonable time thereafter the company erected a new standpipe of larger capacity and greater pressure; that, under the circumstances, the city could not invoke a forfeiture, nor plead the facts as a defense to the right of complainant to relief.

6. That the agreement between the city and the water company, which provided for commutation of city taxes in consideration of water to be furnished for municipal buildings and public fountains, was void under the constitution and laws of Georgia, but that the water company, upon an accounting, would be entitled to have credit for the value of the water actually supplied under the agreement.

7. That the interest which matured from September 1, 1895, to March 1, 1899, was paid by the water company from funds loaned to it for the purpose by the American Pipe Manufacturing Company, and the interest having been so paid, the complainant was not entitled to recover in behalf of the pipe company, the indebtedness represented by the coupons having been extinguished; that the complainant, having once received payment, can not enforce it again in the interest of the pipe company, who was not a party to the contract and was not in privity with complainant.

8. That, under the Constitution and laws of the United States, the ordinance of the city denying liability on the contract with the water company was legislation affecting the obligation of the contract; that the voters of the city, having authorized the

issue of bonds for the construction of waterworks to be operated by the city, the complainant was entitled to equitable relief to prevent impairment of its rights under the contract; that the contract was an essential part of the security of the bondholders, the right of the complainant to collect the water rentals in default of payment of interest by the water company being confirmed in the mortgage given to secure the bonds, and the exclusive right to make such collections having been assigned, after default, to complainant; that complainant was entitled to an injunction forbidding the city from constructing or operating a system of waterworks in competition with those of the company, or for the purpose of supplying the city with water for fire protection and municipal use; that since it appears that the water company owns no property other than that covered by the mortgage to the trustee, so that a suit for damages against it would not measure up to the standard of an adequate legal remedy, the complainant is also entitled to a mandatory injunction requiring the city and the water company to perform the contract as essential to the protection of the security for the bonds.

General Conclusions of the Master.

1. That the objection to the jurisdiction was not well founded, inasmuch as the jurisdiction rested upon the Federal question presented, without regard to the citizenship of the parties.

2. That the doctrine of *res judicata* was not applicable to the complainant for the reason that complainant was not a party or privy to the State court suit.

3. That this court is not bound to follow the decisions of the Supreme Court of Georgia, rendered after the contract had been made and the rights of complainant thereunder acquired; that the decisions of the State courts, prior to the execution of the contract, had not been so long and firmly established as to constitute a rule of property.

4. That the contract between the city and the com-

pany did not create a debt within the meaning of the constitution and laws of Georgia, and that the same was valid and enforceable.

5. That the exclusive franchise granted by the city to the water company could not be revoked by the city in its own interest, nor could its value be impaired by competition on the part of the city within the twenty years during which the city agreed to take and pay for water for fire protection.

6. That the city could not forfeit the rights and franchises of the water company for inefficient service or for failure to supply water of a higher quality or purity, nor could it plead such facts in bar to the equitable relief sought.

7. That the agreement to accept water for use in commutation of city taxes was void under the laws of Georgia.

8. That complainant was not entitled to enforce in this suit any rights that the American Pipe Manufacturing Company may have acquired by reason of having furnished the water company with funds to pay maturing interest coupons on its bonds.

Relief Recommended by the Master.

1. That the contract between the city and the water company be declared to be valid, binding, and enforceable.

2. That an injunction be granted complainant prohibiting the city from negotiating or disposing of the bonds authorized to be used to construct a water system by the city, and from constructing or operating any water system in the city of Dawson for supplying either the city or its inhabitants with water for fire protection or domestic use.

3. That the city be enjoined from revoking or attempting to revoke the rights and franchises granted to the water company during the term of twenty years, within which it contracted to take and pay for the water.

4. That the city should pay complainant the water rentals from January 1, 1896, with interest on each

instalment thereof as the same matured, at the legal rate.

5. That an accounting be had between the parties to the suit to ascertain what is due by the city for water furnished by the water company under the agreement made in commutation of taxes, and the value of the water so supplied should be allowed as a credit against the demand of the city for *ad valorem* taxes on the property of the water company; that until such accounting be had, and until the city pay over the amount found to be due for water, the city be enjoined from proceeding with the collection of the taxes until such accounting and settlement.

6. That the city and the water company be required to specifically perform the contract forming the subject of this suit, and to that end a mandatory injunction be issued.

The Master made report on April 27, 1903, and the city filed exceptions thereto. The court overruled all the exceptions and rendered final degree on August 3, 1903 (pr. rec. 166). The report was confirmed in all respects, the decree being framed to measure the recommendations of the Master. An appeal brings the case before this court.

SPECIFICATION OF ERRORS.

It is assigned that the court below erred (see pr. rec. 175–219):

1. In not dismissing complainant's bill for want of jurisdiction, because under the pleadings there was no diversity of citizenship, the water company, the real complainant, and the city, the defendant, both being Georgia corporations, the assignment of the cause of action to the nominal complainant being ficticious, merely colorable, and without interest, and for the purpose of conferring Federal jurisdiction.

2. In overruling defendants' demurrer to the jurisdiction, because there was no Federal question presented, the city having passed no law impairing the obligations of the con-

tract with the water company, and having taken no action tending to deprive the bondholders of the water company of their property without due process of law.

3. In not dismissing said bill for want of jurisdiction, because under the pleadings there was no Federal question involved or other ground of jurisdiction, the alleged Federal question being predicated upon an alleged contract such as was expressly forbidden by the constitution of Georgia.

4. In not dismissing said bill for want of jurisdiction, because (1) there was no equity therein, the only right of action set up being a common law right, and only enforceable as such; (2) there was no contract or facts set forth to sustain equitable jurisdiction; (3) the alleged right of recovery was one for water rents, which could only be determined in a proceeding at law; and (4) the only right set up requiring equitable remedy to protect, namely, the exclusive franchise in favor of the water company, if such as alleged, could not exist under the constitution of Georgia.

5. In not dismissing said bill for want of jurisdiction, because complainant had an adequate and complete remedy at law, it appearing from the pleadings that equitable jurisdiction was solely invoked to protect from impairment an alleged exclusive franchise such as the city of Dawson never conferred and never had the power to grant.

6. In entering said decree, because all questions and issues raised by the bill were *res judicata*, the appellants having set forth in their answer that on the 14th day of March, 1899, the Supreme Court of Georgia, in a suit for rentals for the year 1895, by the Dawson Waterworks Company *vs.* the City of Dawson, under the very contract forming the subject of the present suit, decided and adjudged that under the constitution and laws of Georgia, and its settled policy, said contract was void *ab initio*, these appellants then and now contending that by said judgment, and the proof thereof which was duly presented, the complainant was estopped and concluded, as well as the water company,

its interest being identical with that of the water company, the water company being the real complainant and not a defendant as pretended, the suit being collusive and fictitious for the purpose of avoiding said judgment, the nominal complainant having become the assignee of the cause of action since the date of said judgment.

7. In entering said decree adjudging that complainant recover of the city of Dawson the sum of the water rentals accruing since 1895, because the contract between the city and the company was only operative from year to year until renounced, and having been declared so by the Supreme Court of Georgia, the highest court for the construction of the laws of said State, the Federal court was in duty bound to follow the decision of said court.

8. In entering said decree adjudging the recovery prayed for, because the court should have followed the decision of said Supreme Court which declared that the contract was void, said decision being declaratory of a rule of property which had already been established by said court in various decisions rendered prior and subsequent to the date of the contract between the city and the said company, said State court having never made any decision previous to said date in conflict with its determination of any material issue decided in the case of Dawson Waterworks Company *vs.* the City of Dawson.

9. In adjudging the contract between the city and the water company to be valid, binding, and enforceable, and that the ordinances and conduct of the city, whereby it was sought to invalidate said contract, were unconstitutional, as seeking to impair the obligation of said contract, because the city says that under the pleadings, evidence, and law, the obligation of the contract alleged and adjudged to be impaired, did not exist, namely, the alleged grant of an exclusive franchise by the city to the water company.

10. In enjoining the city from erecting any system of waterworks to supply water for fire protection or to furnish

the inhabitants of said city with water for domestic, sanitary, and other purposes, or from contracting with any person for the construction, operation, or use of any water system, or for water for fire protection or other municipal purposes, or from laying water mains in the streets of said city, etc., because such decree could be lawfully granted only on the ground that the water company had acquired in its grant an exclusive franchise to construct, maintain, own, and operate its works in the city, such as the municipal corporation had no power under its charter or otherwise to confer.

11. In entering such decree against the city, because the sworn answers of the defendants and the weight of the evidence adduced at the hearing showed that the inhabitants of the city were greatly in need of a sufficient supply of water for fire protection and for domestic, sanitary, and other useful purposes, it being the right and the imperative duty of said municipal corporation to provide such supply of water, which had not been and was not being furnished by the water company, and not within the ability of the existing system to furnish it.

12. In enjoining the city from erecting waterworks of its own and from using the streets for distributing the water, because under the pleadings, the evidence and the law of contract obligation, and as a matter of fact the city never made any agreement, valid or invalid, not to erect waterworks of its own and use its streets for the purpose of distributing water, and under its charter and the State constitution it could not have made any such valid agreement.

13. In entering said decree, because under the pleadings the former officers of the city, the waterworks company, and the complainant, had no power, by contract or otherwise, to deprive the inhabitants of said municipality of their right under the law to a suitable supply of water and from a competitive source if need be.

14. In granting said decree, because the alleged perform-

ance of said contract by the water company was denied in the sworn answers of defendants, and the evidence adduced at the hearing showed that said company had failed during the years for which rentals were claimed, namely, 1896, 1897, 1898, and 1899, to the date of the filing of the bill, to perform the alleged contract so as to be entitled to receive the rentals claimed to be due.

15. In adjudging that complainant recover of the city the water rentals accruing since January 1, 1896, because it did not appear from the evidence or otherwise that said rentals had been earned by the water company by performance of its alleged contract.

16. In enjoining the city from levying and enforcing, in violation of said contract, the collection of any city tax or license fee against the property of the water company, stipulated in said contract to be paid in water, because the court having found the agreement providing for such commutation to be void, it was unlawful for it to arrest the levy and process of collection of taxes and license fees.

17. In adjudging that complainant recover future instalments of water rentals during the life of the alleged contract, because the right of recovery of such instalments would depend upon the performance by the water company of its part of the contract, it being in contravention of law to decree recovery in advance of performance, and before the instalments could be due, in event of performance.

18. In adjudging, at the instance of a third party with no duties to perform, that the city and the water company be required to specifically perform the contract between them and to comply with their respective obligations arising and to arise thereunder, and that to such end an injunction be issued requiring specific performance, because the remedy of specific performance can not be properly so invoked, and as thus applied is not justified by the terms of the contract and the law applicable thereto.

19. In taxing this defendant with the compensation of

the Special Master, because no good reason appears why the city should bear the entire burden of the litigation.

20. In allowing the sum of $2,000 as compensation to the Master, because such amount is excessive when measured with the service performed.

(Overruled Exceptions to Master's Report.)

21. In overruling the first exception of law, which was as follows (pr. rec. 130–5):

By numerous witnesses the city proposed to prove by what occurred at various fires that the waterworks, as constructed and operated, did not come up to the requirements of the contract as to pressure. The testimony offered is briefed as follows:

> By *A. J. Baldwin* (pr. rec. 515): That at the fires that destroyed the residences of F. L. Parks, one in the year 1898 and one in the year 1899, the hose was attached to the plugs of the Dawson Waterworks Company, not over 400 feet away, on one of the principal streets of the city, and the force from the same was not sufficient to do anything towards extinguishing the said fires; and the building in each instance was burned down; that the force of pressure from said hydrants was so weak that those trying to throw the water on the fire could not get near enough to throw the streams on the fire, although they did stand within 40 or 50 feet of the building.
>
> That witness witnessed the fire that destroyed the Dawson Oil Mill, in Dawson, on the 4th of January, 1899. The mill was in full operation and supplied with 200 feet of standard hose, same kind and size of nozzle as the city's hose. This hose was immediately attached to the Dawson Waterworks Company's hydrant, 15 feet from the corner of said mill, by the hands, and turned on said fire. The pressure of said water was so weak it was entirely insufficient to prevent the burning of said building, although attached and put to work very promptly, and in consequence of said weak pressure thus used, those using the hose were unable to stay near enough to the fire to throw

water on it. That the pressure at the time was not sufficient to throw the water over 30 feet high with a one-inch nozzle attached to the hose. The mill was on one of the principal streets of the city and one of the lowest points, being ten feet lower than the base of the standpipe of the waterworks company.

Witness saw the fire which destroyed the Farnum House, in April, 1898, being near his place of business. Fire caught in kitchen, low one-story building, not more than fifteen or twenty feet high, and the streams of water from the waterworks did not and could not reach more than 25 feet high on that occasion. Don't know whether the nozzle was ¾ or one inch, but it was one or the other. On this occasion witness was hit by the stream of water with its full pressure in the face while standing within eight feet of the nozzle and suffered no inconvenience from it, except slight strangulation. At the time this happened the nozzle was not more than about 50 feet from the plug. Witness can not state the length of the hose. Witness could not state positively what the length of the hose was. It was probably 150 feet. Eight buildings were destroyed on this occasion, and the fire was never checked until the people were able to get the steam fire engine belonging to said city at work, when the flames were subdued by said engine. That from his own experience with fires, he knows that a pressure equal to that agreed to be furnished by the Dawson Waterworks Company, viz, 50 feet vertically in still air, this fire could have been extinguished with the apparatus then in hand and with the hose being used, with slight damage to the hotel and kitchen. Witness was at the fire that destroyed the J. R. Smith residence, May 1, 1899. The plug to which the hose was attached at said fire was about 400 feet from said residence, and the pressure was not sufficient to throw the stream over a chimney 26 feet 4 inches high. Witness measured the chimney and saw the failure.

By *J. S. Lowry* (pr. rec. 516): That after the hose was attached to the hydrants of the waterworks company on one of the principal streets of the city, when an effort was made to extinguish the Farnum house

fire, the water could be thrown barely to the top of the kitchen, one-story part of the building, not over 22 or 23 feet high.

By *F. M. Jennings* (pr. rec. 516): As to the dry kiln fire in 1899, that the stream was never over 25 feet high; and that at the Grier residence, consumed in 1898, the pressure was not sufficient to throw the water on a servant's house in the yard, not more than 20 or 25 feet high; and that he saw a man carry the nozzle nearly to the top of said house and pour the water from it. It would not have thrown a stream. Also the Parks fire in 1899, the pressure was not sufficient to throw a stream to the top of the house, it not being more than 30 feet high. And also substantially the same as to the oil mill fire.

By *A. M. Raines* (pr. rec. 516): That at the oil mill fire the pressure was so weak that in order for witness to throw the water on the end of the stable, which was adjoining said property, and it was not more than fifteen feet high, witness was compelled to put the end of his thumb over the nozzle so as to make it squirt a small stream on said stable and keep it from catching fire from the heat of the other fires. That said property was on one of the principal streets of the city. Witness was at the Parks fire, and in order to prevent the building on the opposite side of the street from catching fire it was necessary to go on top of the veranda so as to be able to throw the water from the hose on the roof of said building, which was a one-story building not more than 20 feet high.

By *E. L. Rainey* (pr. rec. 516): That the stream at the Grier fire in 1898 could not be thrown to the top of a one-story frame house not more than 20 feet high. That at the Parks fire the stream could not be thrown more than 15 feet high; and that it was necessary to get the water on top of the house, 24 feet high, to carry the nozzle to the place where needed and let the water pour out.

By *A. J. Carver* (pr. rec. 517): That when the Farnum house burned in 1898, he noticed that the pressure from the hydrants of the waterworks company was very poor and inadequate at first, but that

later the pressure was very much better. The cause of this improvement witness is not able to state, as the city's fire engine was soon put in operation and the water pumped from the cisterns of the city, as well as from the hydrants.

By *Charles Deubler* (pr. rec. 517): As to the Baldwin & Company and Geise dry-kiln fire in 1896, that the pressure was wholly insufficient to throw a stream more than 25 feet high; that at the Variety Works fire the pressure was lacking and the fire engine had to be called into requisition to accomplish anything.

By *J. R. Mercer* (pr. rec. 517): That at the Parks fire in 1899 the pressure from the hydrants was so inadequate the holder of the nozzle had to get on top of an adjacent building in order to get water there, and that the water could not be thrown more than 30 feet high.

By *W. F. Locke* (pr. rec. 517): That at the Whitchard fire in June, 1897, the waterworks company's hydrants were insufficient to throw water 20 feet away from the nozzle.

By *F. E. Clark* (pr. rec. 517): That he attended the fire which burned the residence of Robert Smith in Dawson in 1899, and that the pressure was not sufficient to throw a stream over a chimney about 25 feet high at said fire.

By *T. L. Guerry* (pr. rec. 517): That he was at the Bob Smith fire in May, 1899; that there were about 200 feet of hose attached to the hydrant, and there was not enough pressure to get the water on top of a chimney 25 feet high.

By *C. V. Evarts* (pr. rec. 517): That he attended the fire which burned the residence of Mr. Hamilton, September 20, 1898, in Dawson; that 400 feet of hose were used. Fire was within 400 feet of the pumping station of the Dawson Waterworks Company, said county (Terrell), the hose being attached to a plug of said company, and the water could not be gotten from the nozzle to the top of the veranda, 12 feet high.

By *W. E. Riordan* (pr. rec. 517): That he was present at the lumber kiln fire in Dawson in 1896, and that the pressure of the water from the hydrants of the

waterworks company was not sufficient, during his observation, to throw the water ten feet from the nozzle.

The Master ruled as follows (pr. rec 514, 517):

The question now under consideration is not the effect of this evidence, but its relevancy to the extent of making it admissible. Should the Master err in excluding testimony, the result would be to put the parties to additional expense, cost, and delay; and for that reason I am liberal in my views, that is, I try to be, as to the admissibility of the testimony. Nevertheless, if I am clear that testimony is not relevant, and should not be admitted, I feel I should not admit it.

Now the contract in this case provides for the construction of a system according to the specifications given, and that there should be erected a reservoir of a certain capacity, and of such a height as to afford a pressure under the circumstances stated in the ordinance. As to the system, it is provided that the system shall be thorough and complete and that a supply of water for the purposes stated shall be maintained. I think that imposed on the waterworks company the duty of maintaining an efficient system of keeping a sufficient supply of water on hand.

Now any evidence showing that this reservoir was not of the required height would be entirely admissible. Any evidence showing that under the test provided in this contract, or under conditions substantially the same, showing that the contract was not complied with, I think would be admissible. I shall permit you to prove that the tank leaked. You may introduce evidence to show, if you choose and can, that the tank was not kept filled with water. You may also introduce evidence to show, if you can, under these conditions, or conditions substantially like these, that the pressure was not sufficient to raise the water 50 feet vertically, in still air. I shall permit you to show that there was a total failure of pressure for a greater or less length of time; and if the failure is total, then there is no pressure.

I hardly think we can go into the realm of speculation as to what the pressure would be under conditions which vary substantially and materially from these laid down in the ordinance. In other words, whether the water pressure was weak and continued so for a short length of time under conditions that surrounded the lumber kiln fire.

I hardly see how that illustrates the issue at all. I will permit you to introduce evidence to show that the company has not in any respect maintained its system as it should have done. As I have admitted evidence to show that there was a new tank made, I will admit evidence showing that the tank leaked. You may show that the pipes throughout the city were not properly maintained or flushed; and that the source of supply has been allowed to be contaminated; and that the service was improper. I will permit all that; but I don't think I should permit evidence as to what occurred at particular fires under conditions totally dissimilar from those stated in the contract.

Mr. Guerry: Your Honor's ruling, as I understand it, I would like to show in the record, as invoked upon the offer to prove certain facts, which I have stated, by these particular witnesses, your Honor rules I can not prove.

The Master: You stated that you expected to prove?

Mr. Guerry: By way of illustration.

The Master: In conformity with my general ruling I will exclude the evidence offered, unless it is proposed to show in connection therewith that there was a total failure of pressure, or that the surrounding circumstances were substantially the same as those laid down in the contract for a test. If you can come up to these conditions you may proceed.

The city says that the rejection of the proposed evidence was a material error of law on a vital issue in the case, viz: whether the system of waterworks, as constructed and operated, came up to the requirements of the contract as to pressure, the same being relevant and otherwise competent,

and the city insists upon a reopening of the case so that this testimony may be heard, considered, and given due effect, together with such other testimony of the same character as the witnesses would give upon re-examination in connection with that already reported on the same issue.

22. In overruling the second exception of law, which was as follows (pr. rec. 135):

The city says that the two principal issues of facts arising under the law and actually made by the pleadings were (1) whether the waterworks company had performed its contract as to pressure, both in the construction of its system and in its service, and (2) whether it had performed its contract in the kind of water supplied, and that the Master erred in failing and refusing to decide both of these questions.

23. In overruling the third exception of law, which was as follows (pr. rec. 135):

The city submits that a material issue arising under the law and actually made by the pleadings was whether the water company performed its contract as to pressure, both in construction of its system and in its service, and the Master failed and refused to make any findings upon this issue, and that by such failure and refusal he committed an error of law.

24. In overruling the fourth exception of law, which was as follows (pr. rec. 135):

The city submits that a material issue arising under the law and actually made by the pleadings was whether the waterworks company had performed its contract in the kind of water supplied, and the Master failed and refused to make any finding upon this issue, and that he by such failure and refusal committed an error of law.

25. In overruling the fifth exception of law, which was as follows (pr. rec. 135):

That the Master erred in law in finding against the city, and in recommending the relief as granted or any recovery

by complainant, because the right to relief and recovery depended upon the performance by the waterworks company of its contract as to pressure, both in construction of its system and in service, and upon performance of its contract to supply water suitable for domestic, sanitary, and other useful purposes, there being no finding by the Master that the company had performed its contract in either particular, he having failed and refused to find in favor of such performance.

26. In overruling the sixth exception of law, which was as follows (pr. rec. 136):

That the Master erred in finding and recommending that an injunction be granted complainant against the city; that the city pay the complainant the water rentals due and unpaid from January 1, 1896, with interest, and that the city be required to specifically perform the contract forming the subject of the suit, when under the law and pleadings there was no right of recovery or relief without performance by the water company of its contract to continue during the existence of the contract to furnish a sufficient supply of water to produce such a pressure in the mains that from any hydrant located on the principal streets a stream of water would be projected 50 feet vertically in still air through 100 feet of fire hose, with one-inch nozzle attached, and to supply the city and its inhabitants with water suitable for domestic, sanitary, and other useful purposes, the Master having not found that said contract had been performed, but having found, in effect, on the contrary, that the same had not been performed in his findings of fact, as follows (pr. rec. 90):

VIII.

"The source of water supply adopted by the water company from among those designated by the city consisted of a running stream, into which directly flowed the water of what is known as Dunn's Spring, some four hundred yards above the take-in of the

water company. These waters were among those analyzed by the State chemist, and by him pronounced safe and pure. The water shed does not cover an extended area. The stream above flows through land which is more or less marshy, and upon which there is considerable vegetable growth. The surface water from adjoining hills on one side of the stream flows in above the point of supply. On the crest of these hills are several small residences, the washings from whose premises flow into the stream. There is also on the water shed a scaffold, which has been used from time to time for the slaughtering of cattle in a small way. The stream from which the water supply is derived is not protected from these surface washings by means of dikes or other devices. The condition of the water shed is substantially the same now as it was at the time of the selection and as it has been since. The evidence does not disclose when the slaughtering of cattle began, or how extended it has been. The water is not filtered, but taken directly from the stream and pumped to a stand pipe or reservoir in the city, from which it is distributed by gravitation through mains and pipes to consumers.

"I find from the evidence that at certain seasons of the year the water is safe and pure, as shown by the analysis of the State chemist; at other seasons, during periods of continuous rainfall, the water is muddy and must to some extent be contaminated by reason of the surface washings from the water shed as described. It was disclosed in the evidence that an analysis of the water had been made at the instance of the city or some of its citizens, but this analysis was not offered in evidence, nor was any expert evidence as to the quality of the water introduced, excepting the analysis of the State chemist as above referred to.

"The general assembly of the State of Georgia passed an act, approved September 7, 1891, for the protection of the water supply of the waterworks for the city of Dawson. By this act it was made unlawful to obstruct or interfere with the flow of the stream, or pollute or contaminate in any way or by

any means the water of the stream or water shed, so as to effect in any degree the quality or purity of the water. It was made unlawful to place or deposit any dead animal or vegetable matter in the swamp bordering on and surrounding the stream, its springs and branches, so as to effect the purity and quality of the water. The violation of these provisions was declared to be a misdemeanor. The police supervision of the marshal and policemen of the city of Dawson was extended over the water shed, and the officers were empowered to make arrests therein for violation of the provisions of the act. The ordinance of the city of Dawson made it the duty of the mayor to appoint three members of the council, whose duty it should be to superintend the waterworks and water supply of the city, and to see that the owners of the waterworks company complied with their obligations in furnishing water to said city and private individuals (City Code, paragraph 242).

IX.

"The water company erected a reservoir exceeding in capacity that required by the contract. The height of this reservoir from its bottom to the surface of the earth below was 65 feet. Upon a test by the city it was ascertained and declared that the system met with the requirements of the contract, and I therefore find that the reservoir was of the prescribed height and capacity. Much evidence was introduced and offered to show that sufficient pressure had not constantly been maintained. It appears that on one occasion the reservoir was found to be empty, but this occurred shortly after the construction of the waterworks and before the repudiation of the contract by the city, and is therefore not material to be considered in the present case. At times the reservoir leaked. On one occasion the local superintendent of the water company tested the pressure from a point on what is known as an end pipe. The water failed to reach a height of fifty feet vertically. It was shown that this test was a voluntary act of the local superintendent without notice to the officers and

owners of the waterworks company or to the city. Gauges indicating the height of the water in the standpipe, and the consequent pressure, were placed at the pumping station of the water company and also in the engine house of the city fire department. Excepting on rare occasions the reservoir was kept supplied with water sufficient to produce the required pressure. No complaint concerning the character of the service or the amount of the pressure was made to the water company until after the institution of the present suit. The water company has since erected a new reservoir of more than double the capacity required in the contract and of a greater height than the first reservoir. Since the erection of this new reservoir there has been no complaint or question as to the pressure."

27. In overruling the seventh exception of law, which was as follows (pr. rec. 137):

That the Master erred in his first conclusion of law (pr. rec. 94) in finding that the court had jurisdiction of the cause on the ground that a Federal question was involved, because such question depended upon the existence of an exclusive franchise which did not exist.

28. In overruling the eighth exception of law, which was as follows (pr. rec. 137):

That the Master erred in his first conclusion of law (pr. rec. 94) in finding that there was equity in complainant's bill, because there was no equity in said bill, and the complainant had an adequate and complete remedy at law.

29. In overruling the ninth exception of law, which was as follows (pr. rec. 138):

That the Master erred in his second conclusion of law (subd. 1, pr. rec. 95) in finding in favor of complainant upon the question of *res judicata* raised in the city's answer, the city having pleaded that prior to the filing of said bill the Supreme Court of Georgia, in the case of the Dawson Waterworks Company *vs.* the City of Dawson, had adjudged the contract sued on in said bill to be void *ab initio*, and that

complainant was mere privy and assignee of the cause of action involved in the decision of said Supreme Court and had become such since said decision was rendered, and that all the issues made by said bill were *res judicata* as to complainant as well as to the water company, the facts so pleaded having been duly proved.

30. In overruling the tenth exception of law, which was as follows (pr. rec. 138):

That the Master erred in his said second conclusion of law (subd. 1, pr. rec. 95) in finding that complainant was not a privy of the waterworks company as to the suit in the said court so as to be conclusively bound thereby, and that the doctrine of *res judicata* did not apply to it, notwithstanding, and in face of the fact, that it appeared from the pleadings that complainant had become assignee of the cause of action subsequent to the rendition of the decision of the State Supreme Court.

31. In overruling the eleventh exception of law, which was as follows (pr. rec. 138):

That the Master erred in his second conclusion of law (subd. 2, pr. rec. 96) in finding that the contract sued on was valid, notwithstanding the Supreme Court of Georgia had repeatedly held that such contracts were void, and in holding that the Federal court was not bound to follow the decision of the Supreme Court of said State as to the validity of the contract in question, because the city says that under the law of the United States and the decisions of the Supreme Court of the United States, it was the bounden duty of the Federal court to follow the decision of the Supreme Court of the State, rendered in construing the constitution of the State, and the contract made in said State and governed by its constitution and laws, because it appeared from the decisions of the Supreme Court of Georgia that said court had never made any decision contrary to its decision in the case of the Dawson Waterworks Company *vs.* the City of Dawson.

32. In overruling the twelfth exception of law, which was as follows (pr. rec. 138):

That the Master erred in his second conclusion of law (subd. 3, pr. rec. 103) in finding that the contract in question did not create a debt within the meaning of the Georgia constitution, because prior to the filing of the bill the Supreme Court of Georgia had decided in numerous cases that such contracts did incur such debts.

33. In overruling the thirteenth exception of law, which was as follows (pr. rec. 139):

That the Master erred in his second conclusion of law (subd. 4, pr. rec. 106) in finding that the water company had an exclusive franchise to occupy the streets and maintain a water system in said city by virtue of said contract, because, under the laws of Georgia, no such franchise could be granted by the city, no such power having been delegated to it by charter or otherwise.

34. In overruling the fourteenth exception of law, which was as follows (pr. rec. 139):

That the Master erred in his second conclusion of law (subd. 4, pr. rec. 106) in finding that the city after making the contract had no right to establish and maintain a water system of its own, or use the streets of the city, in competition with the water company during the life of said contract, because the city says that such construction of the contract made the same the grant of an exclusive franchise by the city to the water company, which grant the city had no power to make, from its charter or otherwise, and because that if the city had no power to make such a grant it had no power to estop itself from denying that it had made the same.

35. In overruling the fifteenth exception of law, which was as follows (pr. rec. 139):

That the Master erred in his second conclusion of law (subd. 5, pr. rec. 107) in finding that there was no requirement in the contract that the quality of water should be

other than that taken in its natural state from the source of supply designated and accepted by the city, because the city says that the contract required the water supply to be suitable for domestic, sanitary, and other useful purposes, and it was the duty of the water company, under the contract, to supply such water. The city submits that to test the water at a time when it was suitable for the objects required, and afterwards allow it to become otherwise, and to supply it to the citizens when wholly unfit simply because it had been accepted when fit, would not only be a violation of the contract, but a gross fraud upon the citizens and the city.

36. In overruling the sixteenth exception of law, which was as follows (pr. rec. 140):

That the Master erred in his second conclusion of law (subd. 5, pr. rec. 108) in finding that the city could not invoke a forfeiture or plead that the water supplied was not fit for domestic, sanitary, or other useful purposes, as a defense to the right of complainant to relief, because the city says that before the complainant can rightfully recover, the water company must have performed its contract in this particular, and have proved such performance, since complainant's right of recovery and relief is based by the bill upon the alleged performance by the company, which was denied by the city.

37. In overruling the seventeenth exception of law, which was as follows (pr. rec. 140):

That the Master erred in his second conclusion of law (subd. 8, pr. rec. 110) in finding that complainant was entitled to an injunction forbidding the city to construct or maintain waterworks of its own in competition with those of the company, because such injunction could issue only upon the ground that the water company had an exclusive franchise to the streets of said city for such purpose, when such franchise could not lawfully exist in the State of Georgia.

38. In overruling the eighteenth exception of law, which was as follows (pr. rec. 140):

That the Master erred in his second conclusion of law (subd. 8, pr. rec. 110) in finding that complainant was entitled to a mandatory injunction requiring the city and the water company to specifically perform the contract as essential to the protection of the security for the bonds, because the city says (1) that said contract is void; (2) that prior to the filing of the bill the Supreme Court of Georgia had declared the same to be void, and (3) that the complainant is bound by the decision of said court as privy, it being shown by the proof and found by the Master that its right to sue was acquired subsequent to the rendition of said decision.

39. In overruling the nineteenth exception of law, which was as follows (pr. rec. 141):

That the Master erred in his second conclusion of law (subd. 8, pr. rec. 110) in finding that the city and the water company should be required to specifically perform said contract because the same was not of such nature as to justify the remedy of specific performance, as the justice of performance on the city's part would depend upon previous performance on the part of the water company, which previous performance can not be assumed in advance as the basis of a decree for specific performance.

40. In overruling the twentieth exception of law, which was as follows (pr. rec. 141):

That the Master erred in his second conclusion of law (subd. 8, pr. rec. 110) in finding that complainant was entitled to a mandatory injunction against the city and the water company requiring specific performance of the contract as essential to the protection of the security for the bonds, because there is no law of specific performance which provides that the two opposite parties to a contract may be required in advance to perform such contract for the benefit of a third person having no obligation thereunder.

41. In overruling the twenty-first exception of law, which was as follows (pr. rec. 141):

That the Master erred in his second conclusion of law (subd. 8, pr. rec. 110) in finding that it should be required to pay complainant the rentals stipulated in the contract, because under the constitution and laws of Georgia, under which the city exists as a municipality, the contract was void and was so declared by the Supreme Court of the State, and the officials of the city would have no right to make such payments, as it would be a misappropriation of the funds of the city, and in violation by such officials of their oaths of office.

42. In overruling the twenty-second exception of law, which was as follows (pr. rec. 141):

That the Master erred in his second conclusion of law (subd. 8, pr. rec. 110) in finding that the complainant was entitled to a decree requiring the city and the water company to specifically perform the contract between them, because the law of specific performance is not applicable to such a contract, and the remedy is not appropriate in such a case.

43. In overruling the twenty-third exception of law, which was as follows (pr. rec. 141):

That the Master erred in his first general conclusion (pr. rec. 113) in finding that the objection to the jurisdiction was not well founded, inasmuch as the jurisdiction rested upon the Federal question presented, without regard to the citizenship of the parties, because the city says that the alleged Federal question depended upon the existence of an exclusive franchise, which did not and could not exist under the laws of Georgia, and that there was no interference threatened as to the franchise of the water company in so far as it lawfully existed.

44. In overruling the twenty-fourth exception of law, which was as follows (pr. rec. 142):

That the Master erred in his second general conclusion (pr.

rec. 113), in finding that the doctrine of *res judicata* was not applicable to the complainant, for the reason that the complainant was not privy to the State court suit, because the city says that under the law the complainant was such privy, and the water company, as shown by the proof and found by the Master, was payee of the water rentals, in exclusive control of the contract and of the right to collect the rentals up to and after the rendition of the decision of the Supreme Court of the State, the complainant having become assignee of the right to collect the rentals.

45. In overruling the twenty-fifth exception of law, which was as follows (pr. rec. 142):

That the Master erred in his third general conclusion (pr. rec. 113), in finding that this court was under no obligation to follow the decision of the highest court of the State, rendered after the contract had been entered into, and in finding that the decisions of the State court on the question involved were not so long and firmly established as to constitute a rule of property, and that this court will decide independently whether there was a contract, the obligation of which has been impaired.

46. In overruling the twenty-sixth exception of law, which was as follows (pr. rec. 142):

That the Master erred in his fourth general conclusion (pr. rec. 113) in finding that the contract did not create a debt within the meaning of the constitution and laws of Georgia, but that such contract was valid and enforceable, because the city says that such finding is an erroneous construction of said constitution and laws, and in violation thereof, as construed in decisions by the highest court in the State. The city further says that the finding of the Master is contrary to his ruling upon the main issues in the case, namely: That the plaintiff had the right to recover such debt without performance and without proof of performance, and in the teeth of its own decision that there had not been performance on the part of the water company so as to

entitle it or the complainant to recover rentals on the ground that the same had been earned by performance.

47. In overruling the twenty-seventh exception of law, which was as follows (pr. rec. 143):

That the Master erred in his fifth general conclusion (pr. rec. 113) in finding that the so-called exclusive franchise granted by the city can not be revoked by the city in its own interest, and that its value could not be impaired by competition on the part of the city itself within the term of twenty years during which the city had obligated itself to take and pay for the water for fire protection, because there was no exclusive franchise and there was no attempt or intention on the part of the city to revoke any franchise held by the water company.

48. In overruling the twenty-eighth exception of law, which was as follows (pr. rec. 143):

That the Master erred in his sixth general conclusion (pr. rec. 113) in finding that the city could not, under the facts of the case, forfeit the rights and franchises of the water company for insufficient service or for failure to supply water of a higher quality of purity, or plead such facts in bar of the equitable relief sought, because the city says that there had been no attempt on its part to forfeit any rights or franchises of the water company on any ground whatsoever, and that no such attempt of forfeiture was alleged in the bill except as to the exclusive franchise which did not exist, and because the contract required water suitable for domestic, sanitary, and other useful purposes, and the city had the right to plead the failure of the water company to supply such water.

49. In overruling the twenty-ninth exception of law, which was as follows (pr. rec. 143):

That the Master erred in his first recommendation (pr. rec. 114) that the contract in question be declared to be valid, binding, and enforcible.

50. In overruling the thirtieth exception of law, which was as follows (pr. rec. 143):

That the Master erred in his second recommendation (pr. rec. 114) that an injunction be granted prohibiting the city from negotiating or disposing of bonds authorized to be used in the construction of a water system, and from constructing or operating any system of waterworks in the city for the purpose of supplying either the city or the inhabitants with water for fire protection or domestic use, because, under the constitution and laws of Georgia, it is not only its right but its duty to do so, since it appears in effect, as found by the Master, that the city and its inhabitants are not being sufficiently supplied with water suitable for the purposes of the contract.

51. In overruling the thirty-first exception of law, which was as follows (pr. rec. 144):

That the Master erred in his third recommendation (pr. rec. 114) that the city be enjoined from revoking or attempting to revoke the rights and franchises granted to the water company under the contract during the term of twenty years it contracted to pay for water, because it was not alleged and did not appear that the city had revoked or attempted to revoke any rights or franchises of the company under the contract during said term.

52. In overruling the thirty-second exception of law, which was as follows (pr. rec. 144):

That the Master erred in his fourth recommendation (pr. rec. 114) that the city shall pay to complainant all water rentals accruing from January 1, 1896, because the contract for the payment of said rentals is null and void, and further that proof of performance of the contract by the company would, at least, be prerequisite to any rightful recovery of such rentals, and the Master found in effect that there had been no such performance.

53. In overruling the thirty-third exception of law which was as follows (pr. rec. 144):

That the Master erred in his fifth recommendation (pr. rec. 114) to the effect that the collection of taxes due the city should await an accounting to ascertain what might be due the water company for such water as may have been used by the city itself, because the taxes being due, and so held, the court had no authority to arrest the process of collection thereof, for the reason stated by the Master.

54. In overruling the thirty-fourth exception of law, which was as follows (pr. rec. 144):

That the Master erred in his sixth recommendation (pr. rec. 114) that the city and water company be required to specifically perform the contract, because that if said company was performing its contract, as alleged, there was no ground for a decree for specific performance, and if the water company was not performing its contract, the complainant had no right to recover water rentals, the contract not being one which can be specifically enforced under the law, and the practice of the United States courts, since performance on the part of the city would be necessarily dependent upon performance on the part of the company, and no court would have right to assume in advance that the water company would be able and would perform its contract with the city.

55. In overruling the thirty-fifth exception of law, which was as follows (pr. rec. 145):

After being served by the Master with the draft of his report, the city appeared and made the following suggestion:

That the Master had omitted a material fact proved by one of the witnesses of complainant, viz, F. A. Ruggles, as follows (pr. rec. 334):

That he (witness) removed the timber of the old tank when it was torn down (since the filing of the bill) in order to construct a new one; that there was at that time in the bottom of the old tank four inches (in depth) of foul and muddy sediment.

Witness had testified to this fact, and inasmuch as he

was introduced by the complainant and his testimony was undisputed, it established a fact of vital importance as showing one of the causes for contamination of the water supply, and as a fact disproving the contention of complainant that the water company had, up to that date, performed its contract in supplying the right kind of water to the citizens of Dawson. The Master admitted the truth of the allegations of the city upon this point, refusing the suggestion on the ground that his report should not be burdened with statement of evidence, but should be confined to the findings of the ultimate facts.

The city charges that the Master erred in not making such report and finding originally, and in not doing so in compliance with its suggestion, because the testimony was too brief to be burdensome, and coming from an uncontradicted witness of complainant, it established a vital and ultimate fact, viz: That the water supplied from the old tank was not suitable for domestic, sanitary, and other useful purposes, as required by the contract.

56. In overruling the thirty-sixth exception of law, which was as follows (pr. rec. 146):

The city submitted as a suggestion of change in the original draft of the Master's report, that James H. Daws, superintendent of the waterworks, a witness for complainant, testified as follows (pr. rec. 357):

> The Dawson Waterworks Company had charge of the original litigation and all these demands against the city of Dawson for water rentals up to the decision of the Supreme Court of Georgia, already referred to.

As this testimony was from one of complainant's witnesses, and as it was undisputed, it established a material fact which should have been reported to the court. The Master refused the suggestion on the ground that the testimony would be burdensome and the finding would not be of an ultimate fact.

The city says that the Master erred, because the testimony established the fact that the water company had charge of all demands for water rentals, and the original litigation for same, up to the date of the decision of the Supreme Court of Georgia, already referred to, and complainant, as privy, was therefore concluded as to all such demands based upon an assignment made subsequent to the date of said decision.

57. In overruling the thirty-seventh exception of law, which was as follows (pr. rec. 146):

The city made the following suggestion of change in the Master's report, viz: that J. A. Horsley, superintendent of the waterworks and witness for complainant, testified as follows (pr. rec. 368):

> My recollection is during the year 1900, and may be 1899 and 1900, during the very driest season, the pressure went down three or four times. It was run down so there was no pressure. Several times early in the morning it would not run out of the hydrant. was this way I suppose two or three times.

This testimony being from complainant's witness and not contradicted, established a material fact relevant to the question raised by the pleadings as to whether the water company had complied with its contract as to pressure.

The city charges that the constant existence of the required minimum pressure was vital and the very essence of the contract, and the failure of such pressure as shown by this witness, without sufficient excuse, violated the contract and destroyed the right of recovery, and that the Master erred in refusing to change his report as suggested.

58. In overruling the thirty-eighth exception of law, which was as follows (pr. rec. 147):

The city submitted a suggestion of change in the Master's report, namely, that J. A. Horsley, witness of complainant, testified as follows (pr. rec. 372):

> Occasionally they (the people) would tell me in effect that the water was muddy and unfit for use

> and smelled badly, and the pressure was insufficient, for instance on these water ends, and asked me to flush that main so that the water would clear up, and I would do it. They said the water was muddy. Once or twice they would tell me about its being muddy somewhat, smelling badly. During that time I remember complaints made several times about the pressure. My recollection about the first complaint was made during the Whitehard and Green fires in 1897. I have seen buzzards up there (on the tank) in the day.

Inasmuch as this testimony was from complainant's witness and undisputed, the facts testified to became established and were vitally material. This evidence brought home full notice of complaints to the water company, both as to pressure and unsuitability of the water, the testimony of this complainant's witness being in direct contradiction to the allegations of no notice contained in complainant's bill.

It is charged that the testimony established ultimate and controlling facts, and that the Master erred in refusing the city's suggestion.

59. In overruling the thirty-ninth exception of law, which was as follows (pr. rec. 148):

The city suggested to the Master that the two principal issues of fact were (1) whether the water company had performed its contract as to pressure, both in the proper construction of its system and in its service, and (2) whether it had performed its contract in the kind of water supplied, and that the Master should change his report as to find in the negative on both propositions.

The city says that the Master erred in refusing its suggestion, because his own report, in finding of facts numbers 8 and 9, shows that he had in effect reached such conclusion.

60. In overruling the fortieth exception of law, which was as follows (pr. rec. 148):

That the Master erred in finding and recommending any

recovery or relief in favor of the complainant, because under the law, pleadings, and facts as found by the Master himself, there was no right of recovery or relief, and the city submitted that the Master misconstrued the contract and misconceived the issues made by the law and pleadings, which were whether the water company had performed its contract by keeping up the required pressure, and by furnishing the citizens with the proper kind of water, and that before complainant had any right of recovery it was incumbent upon it to prove that the water company had performed its contract in both of these particulars during each period of time for which complainant sued to recover, and during the entire time in order to entitle it to injunction or to any decree for specific performance. The Master made no formal findings upon either of these issues, but his findings of fact numbers 8 and 9 clearly negatived the proposition that the water company had performed its contract in every particular.

61. In overruling the forty-first exception of law, which was as follows (pr. rec. 150):

That the Master erred in law in recommending and finding as a matter of law that the city should pay the complainant the sum of the water rentals accruing since January 1, 1896, because the city says that the Master made no finding of fact to this effect or upon which could be justified such a recommendation or finding of law.

62. In overruling the first exception of fact, which was as follows (pr. rec. 150):

That the master erred in his sixth finding of fact (pr. rec. 90), viz: That no other means for fire protection was afforded by the city (than that of the water company), so that it must have been recognized that in any emergency of fire resort to the use of the water of the water company was necessary and inevitable, and that the city did not forbid the use of this water for its fire department and must have known that it was being continuously so used, because the

city says that the evidence showed that the city had other means for fire protection, viz, the same it had before the waterworks were constructed; that the city did forbid the use of the water by the fire department, and it notified the company through its superintendent that the contract was at an end.

In support of this exception the city refers to the contrary findings in the same finding of the Master, that the city on December 14, 1894, notified the water company that unless a new agreement could be reached for the use of the water after January 1, 1895, the city would not be liable under the contract after that date. In further support of this exception the city also refers to the following testimony (pr. rec. 504):

> By *A. J. Baldwin*, mayor: I was mayor of Dawson in 1894–95–96; remember the action of the mayor and council relative to the abandonment of the contract with the waterworks company in August, 1894. After that I wrote the waterworks company at the request of the council, in December, giving the company notice of the action of the city. The letter is the one that is in evidence. I gave notice to Mr. Horsley, the superintendent, the latter part of 1894, or early in January, I think in 1894, that the city would not be bound for water any more. I also notified Bill Patterson, the colored fireman, and R. A. Bishop, foreman of the Mechanics' Fire Company. When I notified Horsley I told him in substance about the letter I wrote that the city was not bound for the water any longer; that we were not going to carry out the contract made by the former council. We did not consider it binding; that the council had repudiated the contract. I told him council would not be liable for any water. (For letter of Baldwin referred to, see rep. of evidence, p. 329.) The city had same volunteer fire company after January 1, 1895, it had before. City didn't exercise authority over fire company 1895–96–97–98–99, but gave tax exemptions. It was necessary to have fire company to operate the engine and chemical engine we had even if

there was no waterworks. We had a supply of water independent of the waterworks, in six cisterns in the streets. The city gave no direction to firemen or fire organizations during the years named to use water of the company; never gave them any authority to use it; they knew the contract had been abandoned by my having notified the parties. They had no authority so far as the city was concerned, during these years, to use the water of the water company. If the city gave any direction for them to use it I never knew it. The mayor gave no such direction or permission. After '94 I never did, and never empowered anyone else to do so. I was mayor in 1895. Was at bakery fire. The people used the company's water there. My recollection is that I took hold of the hose then as I have at all fires. I do not think that I handled the nozzle. I didn't assist as mayor any more than I did when I was not an official. I helped use some of the water. Even now if I go to fires and see it is necessary I take hold. I did at any time during 1895–96–97. I was mayor during these three years. I always took an active part; helped to use the hose. I did take hold of the nozzle if I could use it. If Mr. Horsley ever notified me that they expected the city of Dawson to pay for the water, I don't recollect it.

By *Dr. J. G. Dean* (pr. rec. 537): Member of council since 1894 to present time. During this time have seen water used by any and everybody; saw people to whom city had given exemptions use water just as individuals; was present and saw it; think other members of the council were present and saw it. Never forbid them from using it, strictly, so far as I know; used the apparatus kept in the building belonging to the city, which were returned after the fire; returned by those who had exemptions and others. Bought new hose '95 and '96. Had the same arrangements after January, '95, we had before. Fire engine not used except in a few of the fires; not over two or three.

By *R. L. Melton* (pr. rec. 570): In 1894–5 was alderman and chairman of fire committee which had especial jurisdiction over fire department. Remember

action of council in 1894 in renunciation of water company's contract. Soon after that had two cisterns pumped full of water and Roberts overhaul engine. This was about the first of 1895. The fire company had a row about that time and went to pieces. Bishop managed one of the fire companies at the variety works. I notified him we had nothing more to do with the city waterworks and must have nothing more to do with the hose. The city waterworks attached their hose to the variety works. I told Mr. Roberts we had no contract with the waterworks company and he could not use their water any more.

By *John Seay* (pr. rec. 576): From '94 to '98 I was chief of police, this city. The organization of the fire department was very poor, I thought. I was member of the fire company. The paid fire department was organized about 1899. Up to this time, during those years, most everybody in general that got there first did the work of putting out the fires. It was the work not of any particular organization, but generally of the crowd that assembled. I always tried to get there. I remember one time taking the reel over to Dr. Dean's; don't think there was a man that belonged to the fire company there except Robert Baldwin. He helped pull it over there. There were sixteen in squad. We were the only two firemen in it; and two negroes helped us, not members.

Chas. Deubler (pr. rec. 619): Resident since '73. Have been in council off and on ever since have been here. Have been chairman of the fire committee, engineer, etc. Engineer ever since they got an engine, except one or two years I quit. I have had experience in dealing with water for fire plugs and engines, hose and nozzle, for the purpose of extinguishing fires ever since I have been here. I think since they bought the engine in '85; somewhere along that time. Since then have been familiar with the different kinds of apparatus the city owned for fire purposes, which consisted first of a chemical engine, 120 gallons, hose reels, steam fire engine, two reels. During those years they kept from 600 to 1500 feet of hose. One reel carried the other 400. The nozzles run from half an inch to an inch.

63. In overruling the second exception of fact, which was as follows (pr. rec. 153):

That the Master erred in his sixth finding of fact (pr. rec. 90), viz, in finding that notwithstanding the city had repudiated the contract it continued to enjoy the fire protection afforded by the water company and to use the water for that purpose, in the same manner and to the same extent that it did prior to its repudiation of the contract, because the proof showed not only a renunciation of the contract by the city but the abandonment of the water system and the means it afforded for the extinguishment of fires, and that the use thereafter of the water of the company was by the people, indiscriminate, including the officials of the city, who were not acting in official capacity or from any authority of the city. In support of this exception the city refers to the brief of evidence contained in the preceding exception of fact.

64. In overruling the third exception of fact, which was as follows (pr. rec. 153):

That the Master erred in his eighth finding (pr. rec. 90) of fact, (1) in making a partial report only of the facts; (2) in finding that the condition of the waterworks was substantially the same as it was at the time of selection, because the evidence showed that the scaffold and slaughter pen was begun and maintained after the selection of the source of water supply; (3) in not finding the causes of contamination as shown by the undisputed evidence; (4) in not finding that the causes of contamination, viz, the slaughter of cattle, leavings of offal, drainage from surface closets, were without the limits and jurisdiction of the municipality; (5) in not finding that the water company had failed after full notice of the causes of contamination to protect the water sapply, and (6) in not finding from the undisputed evidence that because of such contamination, the water furnished to the citizens of Dawson was so muddy, filthy, and offensive

to the smell as to be unfit to drink or to use in cooking, washing, or bathing.

In support of this exception the city submits in substance of the following testimony:

By *John Seay* (pr. rec. 585): Was marshal of city 1897, '98, '99; during that time complaint was made to me about something stinking at the branch at the source of the waterworks. Mr. J. A. Horseley, superintendent of the waterworks, and I went up there and in about fifty yards of the mouth of the inlet pipe where they got their water from, in the stream that runs into the inlet pipe, there was a dead horse. His rump was in the water. He was in a very bad fix; he was rotten. When we pulled him out, the hide and stuff. I don't remember whether he saw the horse pulled out or not. I think he made the negro do it. I think the complaint was made by somebody and Mr. Horsley went up there hunting for it; did not know at the time it was up there. I don't think Mr. Horsley knew it was there until that day he went up and hunted for it. The complaint was probably made to Horsley, and me and Mr. Horsley went up there together. I don't know that I knew it my duty to protect the water supply. I knew it my duty to move it as soon as I found it there. It was out of the city limits, probably forty or fifty feet.

By *J. W. F. Lowry* (pr. rec. 592): Am mayor of Dawson. I know location of waterworks company's plant and surroundings; have seen source of water supply and arrangement by which conducted; where it is appropriated by the company; have examined all the premises up to as far as a spring is designated from which water was to be used to supply the town; Dunn's Spring. The branch extends a great way beyond that. The land through which this branch flows and in which the springs are located, above the waterworks company, is a dark, murky, muddy swamp; and the contamination of the land, especially on the west side, is situated so that all the washings from six to eight residences and the other houses are necessarily

thrown into this branch. That drainage is now contaminated by the surface washings from privies, horse lots, and the butcher pens. The driftings from these places all run into this branch. The whole swamp is very largely covered with vegetable matter, especially above Dunn's Spring. Nothing whatever has been done by the waterworks company to protect this spring or their outlets or this branch above the mouth of the inlet pipe which leads into their waterworks; and as nothing in the way of protection to prevent the flowing of the surface waters from these settlements I have spoken of along the whole side on the west, into these springs and other branches and the main branch above the inlet pipe, it is an absolute fact that all this water does flow into that place. I have had in my family as much experience with this water of the company as it is possible for my family to have, I suppose; have had the water in my house and yard since the beginning. The water has varied. In dry weather the water is clear and apparently fit for use, and but for the fact that we know the contaminated sources from which it came, we might use it for drinking purposes. I have never used it for that purpose because of the source from which it is brought. Sometimes it is very nice for bathing and sometimes it is wholly unfit for bathing. It is permeated with mud as red as mud can make water by flowing into it; I could not tell what proportion of time. I know this—we have not had any rain here of any consequence in eight or ten days, and the water has not cleared up from it yet. I have tried to use the water for bathing purposes; generally use it in bath tubs. I have on several occasions filled the bath tub with water and it was so bad I could not use it; let it out again. Used it almost every week for bathing purposes. It is very objectionable, still we have no other source from which we get bathing water. It is not at all fit, I think, for laundry purposes; never heard of anybody using it for that. Hardly fit for cooking purposes; still we used it for that; boiled it; by that means we hope to destroy the germs, disease-producing germs, that might be

in it. We used it for that because it is so inconvenient to get other water. Some have built an artesian well in our neighborhood because of the fact that it is unfit for use for drinking. The neighbors joined in and dug an artesian well. This has been done by two or three others in town that I know of; maybe three.

By *A. M. Raines* (pr. rec. 605): I know Adams' butcher pen testified about. It is located 200 yards, to the best of my judgment, above the inlet pipe they got their water from. The drainage from this butcher pen flows into the branch the water company gets its water supply from. This butcher pen has been used almost continuously for the last three or four years. The cattle that are butchered are kept right there. The offal is thrown down there on the ground, from where the drainage goes into the branch that the water company get their supply from. The butcher pen is for the public market. I have a farm beyond this butcher pen and I go backward and forward to that farm and have seen beeves butchered there on various occasions. I have used the water of the company since 1898. It has been very muddy and filthy at various times. Sometimes it would stink. We have never drank the water at all; have been afraid to drink it. We tote water from the artesian well to drink; cook with this water sometimes. The time it got to stinking so bad we quit using it for drinking purposes. Where this butcher pen is located is on the private property of Mr. Adams and outside of the city limits.

By *R. J. Sewn*, (pr. rec. 608): Am a butcher. Butchered out here at Mr. Adams four months year before last; know where waterworks station is; the butcher pen is on the hill about 300 yards above the station. Year before last during four months I butchered out there, sometimes three cows a day, sometimes one every day; left the offal there; hogs got some of it; don't know what went with balance; suppose the buzzards got it; saw buzzards there. By offal I mean the entrails of animals and contents. Don't know of any occasion when the offal was taken away. The surface water from there went into the

branch that supplied the waterworks. I have seen cows butchered there this year since Christmas. Some days I wouldn't kill any cattle out there at all; some days would kill one; some days four or five; three or four. Didn't keep the place clean; offal left there on the ground; Adams had hogs there; they had access; Adams' house about 300 yards.

By *R. F. Simmons*, (pr. rec. 601): Know pumping station waterworks company and where they get the water from; know the creek well; know there is a butcher pen two or three hundred yards above, northwest; above waterworks station two or three hundred yards. I don't know any way the water could go from there except towards the creek; I know the butcher pen has been used; have seen them butchering several times; they throw the offal to the hogs; have seen them eating it; that butcher pen has been there two or three years, maybe more; Adams kept the market here in town and supplied the town to some extent. I think the butchering has been going on there two or three years.

By *W. F. Locke* (pr. rec. 614): Have been using water of the waterworks company seven or eight years. Used it possibly two weeks for drinking purposes two or three years ago. Later I got the boy to bring us water from the pump in the business part of the town. Bought a filter and used the water of the waterworks company for ten days or two weeks, and quit using it on account of the filth that had accumulated in the filter. At times the water is muddy and unfit for use. On one or two occasions odor was so bad would not use it for drinking purposes but had water brought from well; that was about four years ago; think I have used the water since 1894. Have not noticed any offensive odor for the past year or two. I noticed once or twice the first year I moved around where I am now living. I detected offensive odor more than once or twice. Two occasions I refused to bathe in the water because of the offensive odor; possibly noticed it four or five times; don't think that was when the water was very muddy; don't remember whether the water was very low; don't know what caused the offensive

odor, but don't think it was mud; never used it for drinking purposes except the two weeks that I spoke of.

By *Walter Christy* (pr. rec. 616): Living here about twelve years; know property of waterworks company; well acquainted with the surroundings, and the creek and spring up there; I lived out there at my grandmother's a year, '90 or '91; since then have visited up there frequently, constantly. There are some houses on the hillside on the west, and a butcher's pen about 150 yards from the stream up there that supplied the waterworks. Mr. Adams did the butchering there for two or three years back. I understand he used it in December of last year. He used it for butchering cattle; I have been there and seen him butchering a good many times; I suppose thirty or forty times during the last two years. Offal and excrement from the cattle is left on the ground for the hogs; don't know that they always consumed it. In case of rain the surface water from where the offal was thrown, where this butcher pen is located, goes into this branch from which the pumping station gets their water. No other source for it to go to. Don't know whether they are using the butcher pen now or not; have not been there since February or March. Sometimes there would be more offal than at others; sometimes two cattle; that is as much as I have seen at one time. Have seen offal there when fresh and when it had been there for some time; about one hundred yards from the creek; never measured it. I know it is on the hillside, and there is no other way for the water to go except into that stream. Where the cattle is butchered there is a slope toward the branch. The ditch goes from the pond into the creek. From the butcher pen it does not drain into the pond. The pond is back in another direction. The pond is dry most of the time. The ditch from the pond runs into the branch.

By *Dr. L. C. Goneke* (pr. rec. 639): Practicing physician eighteen years; lived in Dawson twelve years. Have been using the water of the waterworks company ever since but until last two months. Drank it

for a short while; used it after that for irrigating garden, yard, and for bath tub, kitchen, watering stock, etc.; could not use it as drinking water; caused indigestion. Wife and I quit using it on that account. Used it for bathing purposes. At times it would not be used at all. Entirely too muddy and had an offensive odor. Quite a number of times this was the case during my experience with it after rains. I attributed it to the effect of rain on the water. Peculiar offensive odor when I turned it on in bath tub; didn't use it at all; impossible to say how many times; quite a number in my experience. About as definite as I can be, I suppose about six or eight times in one month and once in two or three months. I attributed it to the rains. In dry weather water was very clear and very good for stock uses and bathing purposes. Could not use it as much as I needed for irrigating purposes. At that time I was notified to hold up on it, by Mr. Horsley, the superintendent. That was the time when I appeared to need it particularly for irrigating; paid for it during the winter when I had no use for it. I state as a physician, having used this water and having had experience with it, I consider it very unwholesome. Not speaking as a physician, I consider it good for bathing purposes, except at times when it became muddy. I consider it good for cooking purposes as soon as it was boiled. Quite a number of times I could not use it for irrigating purposes, in the summer when it was very dry; could not tell what year; near midsummer. I could not tell to save my life what year, only from being put on notice several times during my experience with the water. Not the same summer; three or four summers They have been every summer I use it; I can not be positive about the number of summers. Quite a number of times; six or eight times; something like that; don't think all one year or season. When I was notified to that effect it was during exceptionally dry times in summer.

By *J. S. Lowry* (pr. rec. 650): Have lived in Dawson twenty-five years; in '92 lived on Main street; had water pipe run in rear door to be used for cooking purposes; tried to use it for cooking

purposes and could not; muddy and had a bad odor in '92, in the spring and summer. We cut it off then and since I have been living on Lee street and tried it again this summer; tried it last year. Got it in my yard and every once and a while I tried it; same trouble was the result last year and the same trouble this year; has red color to it and is offensive. Was member of council in '94. Made no complaint officially, made no complaint personally or request for improvement. I quit it.

Dr. A. R. Lamar (pr. rec. 651): Physician eight years; been living in Terrell all that time; Dawson two years and a half or more. Have had experience with the water of the Dawson Waterworks Company; have been using it for irrigating garden and in barn; have used it part of the time for cooking purposes and in the bath room. Did not use it for drinking purposes; found it was bad; had an odor that was offensive. I also saw if you draw it from the hydrant and let it stay over night in the pitcher it would have an odor about it; would have an odor most of the time after setting a while. I consider it unwholesome, so much I did not drink it. It was all right for cooking purposes if boiled. Have never used it for drinking purposes when I could get any other; been using artesian water from town pump. What I say about this water is based on actual test, so far as drinking. I have noticed it is offensive; very often. If you draw it out of the hydrant and let it stand over night in bucket or pitcher, it will always have a bad odor. I have let it stay over night in a bucket or pitcher to see, about 365 days in a year. It is not always offensive in the morning, but nearly always so. Running water, as I understand it, purifies itself by coming in contact with the air, and standing water, especially if there is any nitrogenous matter in it, putrifies. My idea is that standing all night in a pitcher it putrifies. If the water was pure I would not expect it to putrify. I mean by nitrogenous matter in it, vegetable and animal matter; inorganic; that causes the putrifaction.

By *Chas. Deubler* (pr. rec. 654): Live right across the street from new tank, top of it is open; of the old

one was covered. I have seen buzzards roosting on the new standpipe at different times in the daytime, as many as six there at one time. It has been so within the last two weeks. You can see them there most any time in the day, as many as one, roosting there, as far back as directly after it was built. It is a roosting place for buzzards; they roost awhile, then sail off and another will come.

By *A. J. Baldwin* (pr. rec. 612): The school here in our present condition is supplied with artesian well water; has been for five years, because the board and teachers at that time considered the waterworks' water as unfit for use in the school. I am a member of the board. I was at the time of the meeting and acquiesced in it; the board acquiesced in it. I think it was on the recommendation of the superintendent and the complaints of the people and teachers at that time. It was verbally condemned by the concurrent action of the committee. Had to pay $5 a month to have water hauled to the school. Had water connected at the school with the city water, I think soon after the waterworks were put in. They have kept it there all the time until three or four years ago.

By *J. A. Horsley* (pr. rec. 667): Superintendent of water system and witness for complainant. I reported the dead horse to the chief of police, because I knew it was wrong to let it stay there, people getting water from that stream. As soon as I discovered it was up there I went to the chief of police at once. For eight or nine months I spent much of my time in the engine house where the water is pumped. I have spent my other time around on the streets about in different places; I go down and inspect things occasionally as superintendent. I don't stay there regularly. I don't stay at the standpipe regularly. I stay about on the streets engaged in other business, real estate and life insurance. Don't know whose horse it was that died in the branch; understood it was a negro's. Did not know he was there before he died (page 135). Occasionally the people told me the water was muddy, unfit for use, smelled badly, and pressure was insufficient, for instance on these water ends, and asked

me to flush mains so the water would clear, and I did it. During that time I remember complaints made several times about pressure. My recollection of first complaint, Witchard and Green fire, '97. Have seen buzzards on tank in day.

By *F. A. Ruggles*, witness for complainant (pr. rec. 344): I removed the timbers of the old tank when it was torn down and ordered to construct a new one. There was at that time at the bottom of said old tank four inches in depth of foul and muddy sediment.

The city, in support of this same exception, refers to the affidavit of George Calloway, employee of the waterworks company, filed by consent of Master and counsel on both sides of the case as evidence in the case, May 29, 1902 (pr. rec. 753), and another of the same witness, June 3, 1902 (pr. rec. 755), and after the re-examination of the other witnesses orally, proving the discovery, in the water tower of the company, of three dead and decayed buzzards in May, 1902. The city refrains from encumbering the record in briefing all of the testimony to the same effect as the above, inasmuch as the same was not contradicted to any extent in any material particular, and inasmuch as the Master himself has found, informally but in effect, that the water was not kept in a condition suitable for the purposes intended.

65. In overruling the fourth exception of fact, which was as follows (pr. rec. 160):

That the Master erred in not finding that the water supplied to the citizens of Dawson from January 1, 1896, up to the filing of his report was not suitable for domestic, sanitary, and other useful purposes. In support of this exception the city refers to the testimony briefed in support of exception of fact No. 3. Said testimony was not contradicted to any extent in any material particular.

66. In overruling the fifth exception of fact, which was as follows (pr. rec. 160):

That the Master erred in finding (findings of fact, No. 9, pr. rec. 92), that except on rare occasions the reservoir was

kept supplied with water sufficient to produce the required pressure, because he should have found from the evidence that the water company had not performed its contract as to pressure, and that its service had not been adequate or reliable to the extent required by the contract.

In support of this exception the following brief of the evidence is submitted:

> By *W. R. Baldwin* (pr. rec. 501): When the cap was taken off the plug at the kiln fire water would not come out at first, but solid, soft mud. I suppose a half minute; might not have been so long before the water came; commenced coming mud. I saw the mud come out and I stopped and looked at it. The hose was two or three feet from it when the mud came. By the time the hose got there I suppose one-third water came and the rest mud. When it first came out it was solid, soft mud. It was coming out of the end of the hydrant. It was on Main street about 100 yards from the public square. It was on the principal street in the city, about a block from the business center.
>
> By *A. J. Baldwin* (pr. rec. 512): After the three houses burned at Green and Whitchard fire, 1897, a day or two Mr. Horsley told me they were going to make a test and I went with him. He took 100 feet of new hose furnished by him and went over there and attached it to the plug in front of Mr. Melton's, the same plug that played on these buildings of Green and Whitchard. Had two sections of hose, fifty feet each, new, attached to the plug, a one-inch nozzle, and the water barely went above the electric light pole. It was turned on full. It went not exceeding five feet above the pole. The pole was 25 feet high. The height of the water did not exceed thirty feet. The air was still enough to make a straight stream; ordinary condition of air; no interference with stream by wind. This was in 1897. No change had been made in the waterworks from '94 up to this time, that I know of, and none from the date of that test up to the time the new tank was built. The Green

and Whitchard houses were burned up. I remember the Grier and McClellan fires in '98 on Lee street. The distance from the plug to the building there was 80 feet, and the house sets inside some 25 feet; 100 feet, I would say, from the plug, excepting the width of the sidewalk. There was no unnecessary amount of hose. There was only one line of hose from the plug.

By *J. G. Dean* (pr. rec. 539): The old tank from the ground to the bottom of the tank was 59 feet and 7 inches. Mr. Baldwin and I measured it. For several years before it was torn down it leaked badly, never possible to fill it entirely, at least for several years before it was torn down. Might possibly by pumping all the time get it full. During these years it was not generally kept full; it leaked so badly; it was possibly kept two-thirds or about three-fourths full. The present tank is forty feet higher than the other.

By *Dr. W. B. Cheatham* (pr. rec. 555): During '96–97–99, I think twice, I can remember no more positively than that, I found the standpipe empty; one time in the day and the other at night. I tried to draw some water in my bath tub, is the way I know it was empty. At another time I thought it was frozen. The weather was all right the first time, I think it was in the spring; not cold water. There was no water in the tank at all; could get no flow. I told Mr. Horsley and he stated to me, I think upon investigation, that this standpipe was empty. It was empty twice; not on account of any freeze; been stopped up several times by freezes. It was twice, I think that Mr. Horsley admitted, that the pipe was empty. The fault of the engineer or somebody; I don't know who. The last time I found it empty it was between '97 and '99. I can not say what year prior to that time it was. Where I live the surface is lower than the surface at the standpipe. I investigated all around and the water would not run from my faucet in my house; during '95–6–7–8, the standpipe was rotten and leaked. It was leaking all along. I saw it; a considerable stream would pour out between the whole body of it; between the staves where they came together; twenty feet from sidewalk; in-

terfered with passage. Sometimes you would have to go around on the other side of the street to get out of the spray of the water from it. It would wet the sidewalk so it was almost impassible, especially when ladies would walk around it. Horsley admitted to me that the standpipe was in a bad condition, in conversation about six months before this bill was filed. I remember the test on one occasion on College street, of the pressure, very well. Mr. Horsley, the superintendent, was present. I was there by accident, passing by to see a patient. They attached the hose, turned on the stream, and threw the water twenty or twenty-five feet, or probably thirty feet high. It was some new hose they had; 100 feet. The force of the water was turned on. Mr. Horsley manipulated it. From what I could see the test was made fairly and fully. The air seemed to be pretty still. I noticed that no currents were affecting the stream to blow it one way or the other; seemed to be what you would call still air. The water went from twenty to thirty feet. I noticed the height of it. That was on one of the principal streets of the city.

By *John Seay* (pr. rec. 577): I remember the McClellan fire in June, '98, very well, but not the date. Only one that I remember. I noticed the use of the hose on that occasion; can not exactly give you the length of the hose; can give you the distance of the plug to the fire; don't think there were but three sections of the hose used; don't know what the length of the hose was; some thirty, some fifty feet to a section. It is even 100 feet from the plug to the eaves of the house. I measured that; I do not remember that there was any surplus hose used on that occasion; did not have hold of it myself; I don't think the hose was 100 feet; the water was fully turned on; there was only one line of hose from that plug; it was the size of nozzle used all the time; it was the usual nozzle; I think it was a pretty day; don't think there was any storm concealed; no storm; in my recollection it was still; the hose was about 20 feet; they got there with the hose, but could not get the water on it; we threw the hose up and down, trying to make the water go further; hit

on top of the house about twenty or twenty-five feet; didn't go on the roof of the house; it did go on the eaves; the water went about twenty or twenty-five feet high; not over twenty-five.

By *F. M. McNulty* (pr. rec. 588): Lived in Dawson since '81; alderman at one time; remember the McClellan fire very well, but not the year; I suppose it was 100 feet from the plug to the McClellan house, that was on fire; I think I turned the water on; I turned it on properly; I don't think the hose was over 100 or 150 feet; they didn't have any hose to spare; I don't think there was over 100 feet, though I won't be positive; they had an inch nozzle; the city had an inch nozzle and some three-fourths of an inch; this was the city nozzle; there was not any pressure on this occasion; threw the water about to the eaves of the house, twelve or fifteen feet from the ground; tried to throw the water and could not; did not have pressure enough; was not force enough behind it; don't remember any disturbances in the air; this was on one of the principal streets of the city; got an old door and held it up front of the men holding the nozzle; got up to the house as close as they could that way; couldn't throw the water on top of the house; I remember the test made by Horsley and others in 1897 at Doc Melton's; I was there; Andrew Baldwin was there and Mr. Horsley; I remember those two; had 100 feet of hose; made a full and fair test; Mr. Horsley conducted this, when it was made with the new 100 feet of hose; the air was very calm; it was a one-inch nozzle; Horsley turned the water on; threw the water in every way on that occasion; would throw vertically, and the highest it went was 25 or 30 feet.

By *C. Deubler* (pr. rec. 620): I remember the McClellan fire. Very poor amount of pressure on that occasion; threw the water about 20 or 25 feet. The air was still at the McClellan fire, Parks fire, Green and Witchard fire, and the dry kiln fire when I was present. I will state from my observation of the way the water was thrown and handled and manipulated on this occasion; that there was not sufficient pressure from the waterworks company to have thrown

water through 100 feet of hose, one inch nozzle, in still air, vertically, fifty feet; there was not pressure enough. (The Master allowed this testimony over objection after the witness stated his experience with water and fires.) I remember the old tower; lived 75 or 100 yards, right across the street, in 1895–6–7–8, until it was replaced; it was in a leaky condition. After filling it about half full, further up it leaked; like filling a basket. It leaked all around; shot out in big streams, in some places as big as my hand. Had large streams and small ones all around the staves, running up and down. When the wind was blowing the water would reach my porch. Don't think the tank had been filled in several years (p. 511). It could not be.

By *J. P. Allen* (pr. rec. 642): Acting in capacity of engineer for the waterworks company at the station. Water muddy, right smart. It was deficient in quantity; was not enough of it for filling the tank; that was true right smart; had to run the pump slow; been times in which you could not get enough to fill it at all during dry weather. The standpipe in town was very leaky. I would get it full before I would quit; has taken as long as six hours. My instructions were to keep it full in case of fire. I was required to keep it full. It would be hard to do sometimes. I have to keep the pumps going day and night, and then it would not get full, the tank leaked so bad. Sometimes the water was very muddy and sandy when it was dry, on account of the suction. The water was low down and it would suck sand. The sand would finally clog in the well, and would have to pump sand; would cut out the plungers and valves. Water was very druggy when it was low. I did not drink the water. It was not fit to drink. I thought it was unclean. In opening the pumps I noticed an inch of corrosion and mud clean to the well part of the pump. There was a kind of offensive odor like you will find in muddy streams. I thought the inlet pipe should have been cleaned out. I don't know if I did not mention it to Mr. Horsley that there should be made a hole to keep the same out. Would be sucked up through the

pump. The pump is what kept that from filling up, I suppose; never was cleaned, to my knowledge. I was employed as engineer for thirty days by Mr. Horsley.

On cross-examination: Q. It was filled all the time you ran the pumps during that exceptionally dry spell? Just took longer to fill it? A. Don't think they had sufficient water to fill it; kept running the pumps.

By *E. J. Cameron* (pr. rec. 654): Age 29. Am chief fire department Dawson; have had experience 12 years; from bottom to head of this department; since November, '99. Since present tower have noticed the absence of pressure once that I know of. For twenty minutes, I suppose. I know there was no water in the tower; no water came up here in the engine from spigot. It was six or seven months ago. I immediately notified Mr. Baldwin and Mr. Deubler; thought there might be a burst in the main, or something to cause the leak, or the tank run dry, without their knowing about it. One Saturday morning I started to wash the wagon and the boy complained there was no water coming out of the faucet. I went and tried the faucet and there was none. Went and tried it again in about twenty minutes and the water was coming in full pressure. I don't know sir how long it had been empty.

By *Horsley, superintendent waterworks company* (pr. rec. 368): During the summer of 1900, maybe 1899 and 1900, during the very dry season, the pressure went down three or four times, so low there was no pressure. Several times early in the morning it would not run out of the hydrant. It was this way, I suppose, two or three times.

67. In overruling the sixth exception of fact, which was was as follows (pr. rec. 165):

That the Master erred in his ninth finding (pr. rec. 92) that "No complaint concerning the character of the service or the amount of the pressure was made to the water company after the institution of the present suit," because such

finding is contrary to the evidence and to the undisputed testimony of complainant's own witness, Superintendent Horsley. See brief of his testimony, exception of fact No. 3.

68. In overruling the seventh exception of fact, which was as follows (pr. rec. 165):

That the Master erred in his third finding of fact (pr. rec. 87) "that the city had express notice that bonds were to be issued and sold for the purpose of procuring the money with which to construct the waterworks plant, and that the city acquiesced in this arrangement," because the evidence showed that such notice was not received until after the contract was made and much of the work done by the water company toward construction.

69. In overruling the eighth exception of fact, which was as follows (pr. rec. 165):

That the Master erred in not finding that prior to the date of the assignment of the cause of action of complainant, the water company not only had demanded payment of the water rentals, but also had entire control of the contract, said fact having been proven by the uncontradicted testimony of James H. Daws, superintendent of the water system and witness for complainant (pr. rec. 357).

70. In overruling the ninth exception of fact, which was as follows (pr. rec. 165):

That the Master erred in his fifteenth finding of fact (pr. rec. 93), because the same was wholly irrelevant.

71. In overruling the tenth exception of fact, which was as follows (pr. rec. 165):

That the Master erred in finding for the company the right to recover water rentals and all other relief, because the evidence not only failed to show that the water company performed its contract as to pressure or kind of water or otherwise, but the uncontradicted testimony showed quite the contrary.

ARGUMENT.

Demurrer to Jurisdiction.

Prior to the filing of the bill the city of Dawson was a stranger to the complaining trustee. The contract between the city and the water company was made before the company gave the mortgage to complainant, and the city had no part in the transaction between the company and complainant. Therefore no liability against the city and in favor of the complainant could accrue except such as arose or arises under and out of the contract the city made with the company. Hence, under the averments of the bill, the complainant could have no claim against the city unless the same claim had accrued against the water company. Comer *vs.* Sheehan, 74 Ala. 457; Jones, Mort., 773–4.

When the bill was filed, the complainant as trustee for the bondholders had no accrued demand against either the city or the water company, there having been no default. The water rentals were only mortgaged to secure payment of the interest on the bonds. The court below found (Master's Concl. of Law, No. 2, subd. 7, pr. rec. 110) that all interest maturing prior to the assignment of the rentals by the water company to complainant had been paid and that the indebtedness represented by the coupons on the bonds having been extinguished, the complainant could not enforce payment a second time in the interest of the American Pipe Company, not a party to the suit, which had loaned the money to the water company.

Since, at the date of the filing of the bill, the bondholders had no demand to satisfy against either the water company or the city, complainant's bill was fictitious and simulated, at least to the extent of its claim to recover the accrued rentals.

Complainant had notice of the litigation between the water company and the city, and of the judgment of the

Supreme Court of the State adverse to the water company when it took the assignment of the rentals, and it is patent on the face of the bill that the assignment was merely colorable, not in satisfaction of any accrued demand, and for no other purpose than to confer Federal jurisdiction, so that the right to collect rentals could be litigated in a different jurisdiction, and, notwithstanding the identity of interest, the water company was made defendant, otherwise the apparent diversity of citizenship could not have been obtained.

The matured coupons having been paid, the bondholders had no interest in or lien on the accrued rentals proposed to be enforced by the suit, and under the circumstances of the transfer as set forth in the bill and so found in effect by the court below, the demand for rentals accruing prior to the date of the suit was made by complainant, not as trustee for the bondholders, but as such for the benefit of the water company; the assignment was fictitious and the suit collusive and should have been dismissed. Williams *vs.* Nottawa, 104 U. S. 209; Hayden *vs.* Manning, 106 id. 586; Hawes *vs.* Oakland, 104 id. 459. It should have been dismissed because the transfer was not absolute, but merely colorable (Maxfield *vs.* Levy, 2 Dall. 381, and 4 id. 330; Barney *vs.* Baltimore, 6 Wall. 280, 288), and collusive. Marvin *vs.* Ellis, 9 Fed. 367; Coffin *vs.* Haggin, 11 id. 219. If the water company is the real party and complainant's interest nominal, the bill should have been dismissed. Smith *vs.* Kernochen, 7 How. 216.

Besides, it seems well settled that a mortgage given by a water company, covering rentals accruing under a contract with a city, can not clothe the mortgagee with the right to maintain an action against the city in a Federal court where the mortgagor and the city are both corporations of the same State. American Waterworks *vs.* Home Water, 115 Fed. 171, citing N. Y. Guaranty *vs.* Memphis Water, 107 U. S. 205; Eau Claire *vs.* Payson, 46 C. C. A. 466, on rehearing 48 C. C. A. 608.

In extending the jurisdiction of the Federal courts, Congress was "specially careful to guard against the consequences of collusive transfers," and by section 5 of the act of 1875, c. 237, it imposed the duty on the Federal courts of their own motion to dismiss suits the moment anything of the kind appeared. Congress had in view the protection of the courts as well as of parties against frauds upon Federal jurisdiction (Williams *vs.* Nottawa, 104 U. S. 211), and the suit of a collusive transferee is entitled to no consideration even though he be the *real party in interest as to a part of the cause of action*, he being only colorable assignee as to the remainder (id. 212), and if jurisdiction was first obtained by a collusive transfer, the suit should be dismissed and the parties remitted to their original rights, notwithstanding that since the filing thereof, and before action of the court, the transferee's part had become, from accumulated interest, sufficient to invoke Federal jurisdiction (id. 212).

It was the duty of the court below to have ascertained the matter in controversy and to have arranged the parties according to interest, and when so arranged, if it appeared that citizens of the same State were parties on both sides of the controversy, the court had no jurisdistion, Pac. R. R. Co. *vs.* Ketchum, 101 U. S. 298; Barney *vs.* Latham, 103 id. 211; Removal Cases, 100 id. 457; Walsh *vs.* Memphis, 6 Fed. 797; Saginaw *vs.* Saginaw, 28 id. 529; Covert *vs.* Waldron, 33 id. 312 (authorities cited); Pittsburg *vs.* Baltimore, 61 id. 709; Tug River *vs.* Brigel, 67 id. 629; Oberlin *vs.* Blair, 70 id. 414; National Bank *vs.* Radford, 80 id. 572.

According to interest, a Georgia corporation was complainant and a Georgia corporation was respondent. The bill should have been dismissed for want of jurisdiction.

Federal Question—Equitable Jurisdiction.

No Federal question was alleged in the original bill. Defendants demurred to the jurisdiction for want of citizen-

ship and complainant alleged a Federal question by amendment to prevent the dismissal of the bill. The court below decided that a Federal question was presented, and that it was not concerned as to what motive prompted the simulated assignment, and it refused to arrange the parties according to interest.

Now what Federal question was presented by the amended bill? The object of the suit was (1) to enforce collection of water rentals; (2) to prevent the city from violating its agreement to commute taxes; and (3) to protect from impairment the exclusive franchise alleged to have been granted the water company.

It is settled that a breach is not the impairment of the binding force of a valid contract within the inhibition of the Federal Constitution, and that the remedy therefor and for refusal to pay accrued rentals would be a suit at law. Tex. & R. R. Co. *vs.* Marshall, 136 U. S. 393; Marble *vs.* Ripley, 10 Wall. 358; St. Paul Gas *vs.* St Paul, 181 U. S. 142; Raton Water *vs.* Raton, 174 id. 360; Lehigh Water *vs.* Easton, 121 id. 392; Fergus Falls *vs.* Fergus Falls Water, 72 Fed. 873.

It has been held (American Waterworks *vs.* Home Water, 115 Fed. 172) that—

> "A right of action against a city to recover water rentals claimed to be due under a contract is at law, and a Federal court of equity is without jurisdiction to enforce the payment of such rentals, even where it has acquired jurisdiction to determine other matters in controversy between the parties."

And that (p. 181) the general rule that a court of equity having once obtained jurisdiction of a cause should retain it, does not apply in causes of this kind in the Federal courts, because—

> "The Seventh Amendment to the Constitution guarantees, in all legal controversies where the value in controversy shall exceed $20, the right of trial by

> jury. That provision would be defeated if a strictly legal question could be tried by a court of equity (Hipp *vs.* Babin, 19 How. 271; Whitehead *vs.* Shattuck, 138 U. S. 146; Scott *vs.* Neely, 140 U. S. 106)."

No Federal question or ground for equitable jurisdiction could be involved in the mere renunciation of the contract or refusal to pay rentals.

The court below itself eliminated any such question or ground with regard to the agreement to commute taxes by declaring that agreement void (Master's conc. of law, No. 2, subd. 6, pr. rec. 110).

The Federal question and its correlative in this case, the equitable jurisdiction, must then of necessity be predicated solely on the impairment of the exclusive franchise alleged to exist in favor of the water company and so held to exist by the court below.

The fundamental question of jurisdiction, first of this court and then of the court from which the record comes, presents itself in every writ or appeal, and must be answered by the court, whether propounded by counsel or not. Defiance Water *vs.* Defiance, 191 U. S. 194; Mansfield *vs.* Swan, 111 id. 382.

Even presupposing a valid contract as the basis of this suit, this court has no jurisdiction because, on the face of the pleadings, there has been no impairment of the obligation of the contract in a constitutional sense.

In the early period of our judicial history there was some confusion of the term "obligation" with the word "contract," respecting the constitutional inhibition against the passage of laws by States impairing the obligation of contracts, but this court seized the first opportunity presented and decided that the Constitution used the word "obligation" advisedly (Sturges *vs.* Crowninshield, 4 Wheat. 197; Ogden *vs.* Saunders, 12 Wheat. 269), and that mere annulments or breaches of contract were not within its purview.

> "The terms 'contract' and 'obligation,' although sometimes used loosely as convertible terms, do not properly impart the same idea. The Constitution plainly presupposes that a contract and its obligation are different things" (id. 316).

A contract is the meeting of the minds, but the obligation resulting therefrom does not depend upon the will of the parties, but upon the law and its remedies as they existed when the contract was entered into. Id. 317; Sturges *vs.* Crowninshield, 4 Wheat. 197. The Constitution intended to protect the obligation as it existed and was recognized by the laws in force when the contract was made. Ogden *vs.* Saunders, 12 Wheat. 327; McCracken *vs.* Hayward, 2 How. 612; Bronson *vs.* Kinzie, 1 How. 317.

The obligation, then, protected by the Constitution, is the binding force of any contract as recognized and sustained by the law, when incurred, since it is the law and its remedies which obligate a person to perform his agreement. McCracken *vs.* Hayward, 2 How. 612; Ogden *vs.* Saunders, 12 Wheat. 302; Cooley Const. Lim., 7 ed. 403.

The claim of impairment of the obligation of the supposed contract in this case is based upon the passage of a municipal ordinance by the city and proceedings thereunder, looking to the construction of its own waterworks, it being alleged, and so found by the court below, that under the contract the water company had the sole privilege to purvey water in the city.

The complainant did not even set up that the city ordinance was in pursuance of legislative authority; on the contrary, it admitted in effect that the act of the city was under *color of authority.*

A municipal ordinance, unless passed in pursuance of legislative authority, is not a law of the State within the meaning of the constitutional prohibition. Hamilton Gas *vs.* Hamilton, 146 U. S. 266; N. O. Water *vs.* Louisiana Sugar, 125 id. 31, 38; Lehigh Water *vs.* Easton, 121 id. 392; Mur

ray *vs.* Charleston, 96 id. 440; Williams *vs.* Bruffy, id. 183. A municipal ordinance not passed in pursuance of delegated legislative authority is not a State law within the meaning of the Constitution; to be such it must have the force of a State statute. N. O. Water *vs.* La. Sugar, 125 U. S. 31. The Constitution was aiming at the *legislative power* of the States and not at the acts of administrative boards, or doings of municipal corporations, and only on the theory of agency within delegated powers can an ordinance be considered a State law. Id. 18, 31, 38.

Further, the ordinance must have been in pursuance of a State statute taking effect subsequent to the date of the contract (McCracken *vs.* Hayward, 2 How. 612; Lehigh Water *vs.* Easton, 121 U. S. 391), or else, instead of being a State law, as contemplated by the Constitution, it would be in contravention of the State law. It needs no argument to demonstrate that a municipal ordinance, passed in *violation of the State law* as it existed at the date of the contract, *can not be considered a State law* within the aim of the Constitution. Defiance Water *vs.* Defiance, 191 U. S. 193.

If the city acted unlawfully, it is just as amenable to the laws and courts of the State as an individual.

If the contract obligated the city not to erect a competing system of its own, and the water company has performed as required, the obligations resting on the city remain unimpaired, and the laws of the State and the remedies for enforcing their performance have as much vital force now as they had before the city's refusal to perform.

The means for the enforcement of the obligations of the contract, viz, the laws and remedies which existed when the contract was made, constitute the breath of the contract (Edwards *vs.* Kearzey, 96 U. S. 600), and they have remained unchanged.

The judiciary system of the State is organized to promote justice, and was and is now open to the real complainant to force the city to fulfil whatever obligation it incurred.

Even if a State statute were involved, the question of its repugnancy to the inhibitory clause of the Constitution should be passed upon in the State courts in the first instance, and the presumption is that they will do what is required by the National Constitution (Chicago & Alton *vs.* Wiggins Ferry, 108 U. S. 18, 24; Shreveport *vs.* Cole, 129 id. 36; Bank *vs.* Minneapolis, 192 id. 381, 385; Kentucky *vs.* Stone, 88 Fed. 397), and if error supervenes, the remedy is found by writ of error under section 709 R. S. Defiance Water *vs.* Defiance, 191 U. S. 191, 194.

In the State court suit, no Federal question having been presented by the water company, the case was disposed of on other grounds broad enough in themselves to sustain the judgment which the State Supreme Court rendered, and, therefore, the jurisdiction of *this* court will not attach. N. O. *vs.* N. O. Water, 142 U. S. 79; Millingar *vs.* Hartupee, 6 Wall. 258; Lehigh *vs.* Easton, 121 U. S. 392. In the New Orleans case, there was a contract for commutation of taxes for water furnished the city, which the city repudiated as illegal. The matter went to the Supreme Court of Louisiana, which adjudged the contract void. Subsequently the city passed an ordinance making a new contract with the company for water. Taxpayers filed a bill alleging that this ordinance was a law impairing the obligation of the previous contract which gave the city the free use of water. This court dismissed the writ of error on the ground that the contract alleged to be impaired had been declared void by the Supreme Court of Louisiana. The governing principle of that case appears obviously applicable to the case at bar.

So long as the State law has not destroyed or diminished the legal duty to fulfil the obligation of a contract, it can not be said that there has been any State impairment of such obligation, and the issues raised by complainant do not arise under the Constitution (Fergus Falls *vs.* Fergus Falls Water, 72 Fed. 873), and to entertain jurisdiction

would constitute an encroachment upon the province and prerogatives of the State courts.

In Fergus Falls *vs.* Fergus Falls Water, 72 Fed. 873, the company brought action against the city alleging that the city had contracted to pay water rents for thirty years; that the company had complied with the contract and the city had paid the rentals until the council had passed a resolution annulling the contract and refusing to pay further rentals thereunder. The company alleged that the resolution was a law impairing the obligation of the contract, but the court held that the allegation was mere surplusage and did not make the action as one arising under the Federal Constitution, and that even if the averment had brought the case within the jurisdiction, the suit should have been dismissed when it appeared that it did not arise under the Constitution of the United States, but *was only a question as to whether the State had authority under the laws of Minnesota to enter into the contract.* Judge Caldwell, speaking for the court, said (p. 875):

> "The right to contract and the obligation of contracts antedate the Constitution and were not derived from it. An action, therefore, to recover upon the contract in suit, or to enforce its obligation, is not a suit arising under the Constitution. But it is said that the complaint sets up that the defendant, by resolution of its council, declared the contract null and void, and that this resolution impairs the obligation of the contract, and is in contravention of the Constitution of the United States. Conceding all this to be so, it does not serve to make the plaintiff's cause of action one arising under the Constitution. Notwithstanding this averment, it is indisputable that the complaint shows the plaintiff's suit is based upon, and arises out of, the contract in suit, and not under the Constitution. The plaintiff seeks, in its complaint, to inject a Federal question into the case by suggesting that the defendant will interpose as a defense to the suit a resolution of its council which impaired the obligation of the contract, in contra-

> vention of the Constitution. . . . The jurisdiction of the circuit court can not be invoked by any form of pleading in an action like this."

Judge Caldwell quoted the following from opinion of this court in N. O. *vs.* Benjamin (153 U. S. 424):

> "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution upon the determination of which the result depends, then it is not a suit arising under the Constitution." (Cases cited.)

In St. Paul Gas *vs.* St. Paul (181 U. S. 142), it was held that while an ordinance of a municipal corporation may be such an exercise of legislative authority as to be considered a law within the meaning of the Constitution, but authority to pass the ordinance must be predicated upon a *legislative act assigned to exist* before the Federal court could have jurisdiction to prevent the impairment of an alleged obligation. St. Paul had contracted with the gas company for street lights, and the company constructed a large number of street lamps as required by the city charter. Afterwards, by direction of the municipality, electricity was substituted for gas and the gas company was ordered to remove the unused lamp posts. The company asserted its right to recover the interest on the cost of placing the lamps, but the final judgment of the Supreme Court of Minnesota denied its right. A writ of error was prosecuted to the Federal court on the ground that the ordinance in legal purview amounted to action by the State impairing the obligation of the contract embodied in the State's charter by the legislature. This court dismissed the case for the want of jurisdiction, holding that the ordinance did not tend in any way to impair any obligation resting on the city to pay interest on the cost of construction since, *if the contract imposed an obligation to make such payment the duty of the city to do so was left unaffected by the order to remove;* that the refusal of

the city to pay in future the interest on the cost of construction—

> "was but a denial by the city of its obligation to pay, and a notice of its purpose to challenge in the future the existence of the duty to make such payment."

Mr. Justice White, in stating the opinion of the courts, said (p. 149):

> "When the substantial scope of this provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus to reduce the proposition to its ultimate conception is to demonstrate its error."

After distinguishing inapposite cases cited, Mr. Justice White continued as follows (p. 151):

> "As it is apparent from the foregoing considerations that, even conceding the contract to be as contended for, no legislative act is shown to exist from the enforcement of which an impairment of the obligations of the contract—within the purview of the Constitution—did or could result, it follows that the record involves solely an interpretation of the contract, and therefore presents no controversy within the jurisdiction of this court."

In Lehigh Water *vs.* Easton, 121 U. S. 392, this court

held that the constitutional prohibition of necessity referred only to State laws, passed subsequent to the date of the contract alleged to be impaired, and that the suit of the water company was based upon the erroneous idea that this court may review the judgment of a State court involving the *enforcement* of an obligation.

If we have correctly understood the principle of construction laid down by this court in the beginning and adhered to in all of its subsequent deliverances, the things complained of by the complainant relate not to the impairment, but to the non-performance of a supposed obligation, and since no Federal question could be thus involved, the suit should be dismissed.

The Exclusive Franchise Alleged.

Before entertaining jurisdiction, this court will first inquire into the chief matter in controversy here, and determine whether the city had the power to make a grant such as that alleged by complainant. Commissioner *vs.* Platt, 79 Fed. 571. If the city had no power to grant the exclusive franchise there was no obligation to be impaired, no Federal question involved, no equitable jurisdiction, and hence no cause of action.

This court has always held that before it can be asked to determine whether an obligation has been impaired by a State law the existence of a legal contract subject to impairment must be shown, and in order to constitute a violation of the constitutional inhibition against depriving a person of his property without due process of law, it should appear that such a person has a property in the particular thing of which he has been or is about to be deprived. N. O. Water *vs.* New Orleans, 142 U. S. 84, 88; Stone *vs.* Miss., 101 id. 814; Bankers *vs.* Minneapolis, 192 id. 381, 385; Giles *vs.* Teasley, 193 id. 160; Millingar *vs.* Hartupee, 6 Wall. 258.

The contract between New Orleans and the New Orleans Water Company was *ultra vires*, and there was no obligation to be impaired by the city ordinance in repudiating the contract.

In Augusta *vs.* Earle, 13 Pet. 595, Mr. Chief Justice Taney said:

> "Franchises are special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from the law of the State."

A franchise is a sovereign prerogative which can only be vested, directly or indirectly, by legislative grant in pursuance of authority. Nat. Foundry *vs.* Oconto Water, 52 Fed. 29; Grand Rapids *vs.* Grand Rapids, 33 id. 659; Norwich Gas Light *vs.* Norwich Gas, 25 Conn. 38; Truckee and Tahoe County *vs.* Campbell, 44 Cal. 89; State *vs.* Weatherby, 45 Mo. 20; St. Louis Gas *vs.* St. Louis, 16 Mo. App. 72; Citizens' Gas *vs.* Elwood, 114 Ind. 332. Contracts creating monopolies are void, being contrary to public policy (2 Addison, 743; Greenhood Pub. Policy, pp. 180, 643, 670; Central *vs.* Collins, 40 Ga. 582), and are made void by the common law (7 Bacon's Abridg. 22; 6 Coke, pt. 11, p. 84), and a contract giving a practical monopoly is also void. People *vs.* Chicago Gas, 130 Ill. 295.

In National Foundry *vs.* Oconto Water Company, 52 Fed. 33, Judge Jenkins said:

> "It may be difficult to enumerate the common-law powers of a municipal corporation. It is certain, however, that the conferring of franchises upon other corporations is not one of them. Under its charter, by a well-known principle of law, it can exercise no power not expressly granted or fairly to be implied. . . . Dill. Mun. Corp., 4th ed. 27. Without like authority it can not grant the exclusive right to

> use the streets, and a distributing plant located in the streets is essentially a monopoly. The right to use the public highways for gas pipes or water mains rests in legislative authority directly granted or delegated to municipalities."

The promise by the city of Oconto was more definite than that of the city of Dawson, since it undertook, in the contract, to adopt and maintain an ordinance protecting the company in the *safe and unmolested enjoyment of the franchise* granted. The court held that it had no power to confer such a franchise for waterworks and for other things collateral thereto (see also Mt. Pleasant *vs.* Beckwith, 100 U. S. 524; Lee Tong, 18 Fed. 253; Western Union *vs.* Am. Union, 65 Ga. 160; Davis *vs.* Mayor, 14 N. Y. 506; Cooley Const. Lim., 7 ed., 401). In the case at bar the city never even made any such agreement and never promised not to erect works of its own, but the court below not only held that it granted the franchise, but it also *implied* a promise by the city not to erect works of its own.

Exclusive franchises are not favored by the law and will never be presumed or implied, and every statute which takes from the legislature its power will be construed most strongly in favor of the State and not to tie the hands of the public in respect to its future necessities. Detroit Citizens *vs.* Detroit Ry., 171 U. S. 48; Stein *vs.* Bienville, 141 id. 67; Wright *vs.* Nagle, 101 id. 791; Charles Bridge *vs.* Warren Bridge, 11 Pet. 420; Minturn *vs.* Larue, 23 How. 435; East Hartford *vs.* Hartford Bridge, 10 id. 511; Binghamton Bridge, 3 Wall. 75; Gilman *vs.* Sheboygan, 2 Black, 510; Goszler *vs.* Georgetown, 6 Wheat. 593; Central *vs.* Collins, 40 Ga. 619; Long *vs.* Duluth, 49 Minn. 280; Brenham *vs.* Brenham Water, 67 Tex. 554; Dillon, 97.

In Detroit Citizens *vs.* Detroit Ry., 171 U. S. 48, the city under statutory authority had exclusively authorized one company to construct and operate railways through certain

streets. Subsequently it granted to another company a similar right. The first grantee applied for injunction. Mr. Justice McKenna, in speaking for this court, said (p. 53):

> "It is clear that the statute did not explicitly and directly confer the power on the municipality to grant an exclusive privilege to occupy its streets for railway purposes. It is urged, however, that such power is to be inferred from the provision which requires the consent of the municipal authorities to the construction of a railway under such terms as they may prescribe, combined with the provisions of the Constitution, which, if they do not confer a power independent of the legislature, strongly provide for and intend local government. The argument is strong, and all of its strength has been presented and is appreciated, but there exists considerations of countervailing and superior strength. That such power must be given in language explicit and express, or necessarily to be implied from other powers, is now firmly fixed. There were many reasons which urged to this—reasons which flow from the nature of the municipal trust—even from the nature of the legislative trust, and those which, without the clearest intention explicitly declared—insistently forbid that the future should be committed and bound by the conditions of the present time, and functions delegated for public purposes be paralyzed in their exercise by the existence of exclusive privileges."

In Minturn *vs.* Larue, 23 How. 435, the legislature had conferred upon the city of Oakland the power to make and regulate ferries. "Exclusive" power was not expressly given, but seemed within the reasonable intendment of the charter, but the court held (p. 436) that that which was conferred in doubtful terms should be resolved in favor of the public and that the power of a municipality to grant an exclusive franchise should never be implied; that "this principle has been so often applied in the construction of corporate powers that we need not stop to refer to authorities." See also Freeport *vs.* Freeport, 180 U. S. 587.

A statute of Georgia authorized the inferior courts to confer franchises for ferries, but in Wright *vs.* Nagle, 101 U. S. 791, this court held that such courts were not empowered to grant exclusive franchises, on the ground that the State did not intend to tie the hands of the public with regard to its future necessities.

Mr. Justice Peckham, in stating the opinion of this court, in Skaneateles Water Co. *vs.* Skaneateles, 184 U. S. 363, said:

> "There is no implied contract in an ordinary grant of a franchise, such as this, that the grantor will never do any act by which the value of the franchise granted may in future be reduced. Such a contract would be altogether too far-reaching and important in its possible consequences in the way of limitation of the powers of the municipality, even in matters not immediately connected with water, to be left to implication."

In N. O. C. & L. R. R. Co. *vs.* New Orleans, 44 La. Ann. 728, the city had authority from the legislature to establish street railways, but the court held that no authority to grant exclusive privileges could be implied into the legislative grant, and that the attempt of the city to do so was *ultra vires* and not binding on subsequent city councils.

In Westerly Water *vs.* Westerly, 80 Fed. 611, the town had authority to grant a franchise for waterworks *on such terms as it might deem proper*, including the power to exempt the works from taxation, yet the court held that the town had no power to grant an exclusive franchise so as to deprive it of the right to construct a system of its own. Judge Brown said (p. 613):

> "The rights of the public, the rights of the town, are to be scrupulously regarded; and, though franchises to corporations are to be carefully protected, the source of such privileges must be traced either to the direct act of the legislature, or to the authorized act of the agent, acting clearly within the pow-

ers delegated by the legislature in express terms. Grants of exclusive rights such as the town council attempted to confer must rest upon the clearest language and upon the most definite authority, and persons dealing with public servants are strictly and justly held to the obligation to inform themselves as to the rights which they may acquire in so doing. All persons contracting with a municipal corporation must at their peril inquire into the power of the corporation or of its officers to make the contract."

The Walla Walla case having been cited in opposition, Judge Brown explained that in that case the city had expressly, and with proper authority, agreed not to erect waterworks of its own, and that no attempt had been made to grant an exclusive franchise (see also Dillon, 4 ed. 447).

In Norwich Gas Light *vs.* Norwich Gas, 25 Conn. 19, the city had granted to one company for fifteen years the right to lay pipes in the streets, agreeing that no other person should by consent of the council lay gas pipes in the streets during said period. The court held that this was a grant to use the streets in the manner specified, but not to restrain others from a similar use which did not interfere with the works of the first grantee, and that the right to use the streets was not exclusive.

In Brenham *vs.* Brenham Water Co., 67 Tex. 542, it was held that the city had no power to grant the water company an exclusive right to furnish water for twenty-five years, though the charter expressly gave the city power to furnish water, which included power to contract with some other corporation for water supply; and that the contract pretending to grant such right being void, the city had the right at all times to declare it so; that a municipality can not delegate or barter away the powers conferred upon it for public purposes, and the city council had no power to cede away or embarrass its legislative or governmental powers by continuous contract or otherwise so as to disable it from the

proper performance of its public duties (see also Brick Church *vs.* N. Y., 5 Cow. N. Y. 540; Simplot *vs.* Chicago, 16 Fed. 350; Dillon, 675).

In Long *vs.* Duluth, 49 Minn. 280, the city had authority to grant the right to establish waterworks to supply the municipality with water and to make contract therefor, but it was held that this authority did not imply the power to grant an exclusive franchise so as to disable the municipal corporation for the period of thirty years from itself establishing waterworks and a system of supply.

In Syracuse Water *vs.* Syracuse, 116 N. Y. 167, one company charged that another company was proceeding to invade the franchise granted by its charter, but the court held (p. 178), citing authorities, that the grantee of such a privilege takes nothing by inference.

In Lehigh Water *vs.* Easton, 121 U. S. 392, by a State statute the water company acquired an exclusive right to supply the borough with water, and there was an express provision in the act against other incorporation for the same purpose. The water company sought to enjoin the borough from constructing waterworks and from appropriating money therefor. The Supreme Court of Pennsylvania dismissed the suit, holding that the right acquired was exclusive only against other water companies, and that the legislature did not by implication intend to prevent the borough from providing its inhabitants with water by means of works constructed by itself from money from its own treasury. This court held (p. 392) that it was for the State court to determine the question arising under the State contract, and that its judgment in such case was not subject to review (see authorities cited).

In New York, a company intending to engage in a public service must, prior to incorporation, secure the consent of the municipality within which it expects to operate. In re Brooklyn, 143 N. Y. 596, this consent was obtained and the water company incorporated. A contract was made with

the town by which the company was granted the right to purvey water during the term of its charter. The court held that the grant of an exclusive franchise to supply water was not implied by the terms of the statute authorizing incorporation for the purpose so as to preclude the municipality from obtaining water from other sources. The court further said (p. 616):

> "The legislature may not destroy or confiscate the property and franchise of a corporation; but it is not conceivable that the sovereign power can be restricted in its grants of corporate franchises, within constitutional limits, save by its own express agreement; even though the material consequences may be such as to entail loss, if not ruin, upon existing corporations through rivalry and competition. Those are risks, which if they can not be guarded against are assumed by the grantees."

No delegated power was pointed out by the complainant, or by the court below, which authorized the city to grant the exclusive franchise claimed, and such power not being expressly conferred, according to the overwhelming weight of authorities, must be denied.

The city was even without color of such power, because the legislature of the State had never even attempted to delegate it, and had it so attempted the grant would have been void, because expressly prohibited by the State constitution, art. 1, sec. 3, par. 2, which provides:

> "No law of attainder, ex post facto law, retroactive law, or law impairing the obligation of contracts, or making irrevocable grants of special privileges or immunities shall be passed."

An identical prohibition, section 23, article 1, in the Alabama constitution, was construed and applied by the Supreme Court of Alabama, in Birmingham & Pratt Mines Ry. *vs.* Birmingham Ry., 79 Ala. 465. The city gave to one company, in terms, an exclusive right along certain streets and

afterwards gave to another the right to occupy the same streets. The court held that the power to make the first grant exclusive did not reside in the municipality, and there was no equity to protect such grant. In discussing the constitutional provision, the court said (p. 473):

> "What, it may be asked, is the nature of these special or exclusive privileges, which are thus prohibited to be granted by the legislature? It seems plain from the very terms used, that the evil intended to be especially prevented was the granting of exclusive privileges in the nature of a monopoly by the legislative creation of corporate franchises. Monopolies were void at the common law and are not commonly conferred by legislative grant, and need no special prohibition in the organic law of a free republic.
>
> . . . . . .
>
> "The exclusive right of the appellee to the privilege claimed, in our opinion, can not be sustained. The general assembly would itself have no power under the Constitution to make such a grant. *A fortiori*, a mere municipality would have no such power."

This same inhibition has been construed by this court in the case of the Bienville Water *vs.* Mobile, 186 U. S. 212, citing with approval the decision of the Supreme Court of Alabama (pp. 219, 223). The question before this court was one of revocation and amendment of a legislative grant, and speaking for the court, Mr. Justice Brewer said (p. 223):

> "As much force and effect must be given to section 23 as to any other, and it was obviously the intent that even if exclusive privileges were granted, the monopoly feature thereof should always be subject to revocation. In this section there is no suggestion of amendment or alteration. That which is distinctly provided is the absolute power of revocation. To hold that the exclusive feature of plaintiff's grant could not be revoked, because thereby injustice

> might be done to the corporators, is simply to nullify section 23."

It is true that the court below refused to decide whether or not the attempt to grant an exclusive franchise to the water company was valid for 99 years, but it did hold that it was valid and exclusive for twenty years or during the term the city agreed to take water. This conflicts with the opinion of Judge Jackson, in Grand Rapids *vs.* Grand Rapids, 33 Fed. 659, 676, who held:

> "If the power rests in the city council to grant an exclusive privilege for fifteen years, I can not understand why the grant may not under the same authority be conferred for any longer period that may be determined on. The *power* requisite to confer an *exclusive sovereign franchise* for fifteen years involves the right and operation of the same sovereign power which could make the grant for one hundred, or one thousand years, or in perpetuity. If the authority does not exist to make the grant for the longer period, it does not exist to confer it for the shorter; for it requires the possession of the *whole exclusive* power and control to grant either the one or the other."

Though the charter in this case gave the council power to make ordinances *deemed desirable* for lighting the streets, but not in express terms the exclusive power, Judge Jackson held that the city was not empowered by implication to confer an exclusive right to use the streets for wires for fifteen years, and that its attempt to do so was *ultra vires* and void. He also held that it was too well settled to need citation of authorities that municipal corporations, which are mere political agencies of the Government, can exercise only such powers as are granted in express words or fairly implied in or incident to the powers expressly conferred, or those essential to the declared objects and purposes of the corporation, not merely convenient, but indispensable, and any fair doubt as to the existence of a power

must be resolved in the negative. See, also, Detroit *vs.* Detroit, 171 U. S. 48; Saginaw Gas *vs.* Saginaw, 28 Fed. 534; Los Angeles Water *vs.* Los Angeles, 88 id. 720; Omaha Horse *vs.* Cable Tramway, 30 id. 324; Jackson Horse R. Co. *vs.* Interstate Rapid Transit, 24 id. 306; Ill. Trust *vs.* Arkansas City Water, 67 id. 196; People *vs.* Chicago Gas Trust, 130 Ill. 283; Chicago *vs.* Rumpff, 45 Ill. 90; Treadway *vs.* Schnauber, 1 Dak. 236; Gale *vs.* Kalamazoo, 23 Mich. 344; Brenham *vs.* Brenham Water, 67 Tex. 553; Davenport *vs.* Kleinschmidt, 6 Mont. 527; Gaslight *vs.* Middletown, 59 N. Y. 228; Ohio *vs.* Cincinnati Gas & Coke, 18 Ohio St. 262.

In Saginaw Gas *vs.* Saginaw, 28 Fed. 529, the city had authority to cause the streets to be lighted, and under grant from the city the company claimed an exclusive right, but its claim was rejected by the court, which said (p. 535):

> "While there is great force in plaintiff's argument that individuals would not be likely to incur the great expense of establishing gas works and laying pipes without some assurance of a profitable and continued employment for a sufficient length of time to remunerate them for their outlay, we think the law is too well settled that this can not be done, without express permission of the sovereign power, to be now disturbed. If a grant of this kind for thirty years may be supported, why may it not by a parity of reasoning be upheld for a hundred years, or in perpetuity?"

This opinion also seems opposed to that of the court below in the case at bar, to the effect that the grant by the city of Dawson was exclusive for twenty years, though possibly not for ninety-nine.

Implied powers, says Judge Cooley (Const. Lim., 7 ed., 270), "are such as are *necessary* in order to carry into effect those expressly granted," and that (p. 271) "the reasonable presumption is that the State has granted in clear and unmistakable terms all that it has designed to grant at all."

See, also, Omaha Horse R. Co. *vs.* Cable Tramway, 30 Fed. 324; Saginaw Gas *vs.* Saginaw, 28 Fed. 534; Gas Light *vs.* Middletown, 59 N. Y. 228; Chicago *vs.* Rumpff, 45 Ill. 90; Illinois Trust *vs.* Arkansas City Water, 67 Fed. 196; Gale *vs.* Kalamazoo, 23 Mich. 344; State *vs.* Cincinnati Gas, 18 Ohio St. 262; Logan *vs.* Pyne, 43 Iowa, 524.

The very thing that the city of Dawson did not have the right to do was to deprive its inhabitants of the right to a competing water supply, and one council had no power to abridge the power of its successors to provide the municipality with a system of its own if needed and desired.

If, then, the grant by the city was not wholly void, in the light of the limited powers contained in the city's charter, the common law and the prohibition contained in the State constitution, it can not be construed to mean more than a promise that the exclusive right of the water company to the source of supply designated and to the particular ways and means established for the distribution of water would not be disturbed. Stein *vs.* Bienville, 141 U. S. 67; Hamilton Gas *vs.* Hamilton, 146 id. 268; Norwich *vs.* Norwich, 25 Conn. 19; Long *vs.* Duluth, 49 Minn. 280; and not as implying an agreement by the city that it would not grant a similar right to another company, or construct and operate its own system. Joplin *vs.* Mo. Light, 191 U. T. 150; Bienville *vs.* Mobile, 175 id. 109; id. 186; id. 212; Skaneateles Water *vs.* Skaneateles, 184 id. 354; Lehigh *vs.* Easton, 121 id. 392; Westerly *vs.* Westerly, 89 Fed. 611. In the Joplin case, the contract was authorized by a State statute and the plant was erected for public service at considerable expense, and was to be operated for twenty years. It was insisted that by implication from the statute and ordinance the city was precluded from erecting its own plant during the life of the contract, but this court held that there are presumptions against limitations upon the powers of government, and that there could be no such im-

plied contract in the ordinary grant of a franchise by a municipality. The circuit court had taken the opposite view and its opinion was the main precedent cited by the court below to sustain its conclusion that the contract made by the city of Dawson implied an agreement that it would not erect works of its own. The court below also cited the Walla Walla case (172 U. S. 1) in support of its position, but in the Joplin case this court reversed the circuit court and particularly distinguished the Walla Walla case as inapplicable; that in said case Walla Walla, in pursuance of a State statute, had contracted to take water, reserving the right to avoid the contract under certain contingencies, but until avoidance in the manner prescribed, the city had expressly agreed not to maintain waterworks of its own; that the contract was not objectionable, as there was no attempt to grant an exclusive privilege, and being otherwise innocuous and within the powers granted the city, it could only be avoided upon the judgment of a court of competent jurisdiction, the city having expressly agreed upon the method of avoidance. The decision of this court turned upon (1) a contract which the city was expressly impowered to make; (2) one innocuous of itself and not objectionable because of any attempted grant of exclusive privilege; (3) the ground that the city was bound to procure the nullity of the contract in the manner expressly agreed upon. None of these conditions obtain in the case at bar. The city council of Dawson had no legislative or popular sanction for its act, and it is pretended that an exclusive franchise was granted; its contract provided for a satisfactory supply of water and in the event of failure of such supply, the franchise of the company should, *from that fact*, be forfeited. The city reserved the right to determine for itself whether or not the water was supplied as required. If its act in renouncing the contract to pay rentals was unwarranted, its act was a mere breach for which the remedy

was at law. It was not the impairment of the obligation of a contract requiring equitable remedy. Raton Water *vs.* Raton, 174 U. S. 360; St. Paul Gas *vs.* St. Paul, 181 id. 142; Fergus Falls *vs.* Fergus Falls Water, 72 Fed. 873.

The other cases cited by the court below in support of the implication of agreement, viz: Louisville Gas *vs.* Citizens' Gas, 115 U. S. 683; St. Tammany Water *vs.* N. O. Water, 120 U. S. 64, do not touch the case at bar, because in these cases, the grant by the sovereign power of an exclusive franchise vested in the State became, upon performance of the public service required of the grantee, a contract protected by the Constitution of the United States. The very condition upon which was predicated these decisions is wholly wanting in the case at bar, and the countervailing presumptions of superior strength, so frequently referred to by the courts, preclude the presupposition, by legal fiction, of a valid grant.

This court, in reversing the circuit court in the Joplin case, removed the prop of the court below, which now appears to stand alone as the exponent of the doctrine of implication of exclusive privilege in the ordinary grant of a franchise by a municipality.

In further illustration of the presumption against limitations on the powers of government, we cite Stein *vs.* Bienville Water, 141 U. S. 67. Stein was granted "the privilege of supplying the city of Mobile with water from the Three Mile Creek for twenty years," and it was agreed that at the expiration of said term the city would purchase the waterworks, and until purchased Stein would—

> "have the exclusive privilege of supplying to the citizens and inhabitants of Mobile water from the waterworks aforesaid."

Stein constructed the system and maintained it in compliance with the requirements of the contract. However, another franchise for waterworks was granted to the Bien-

ville Water Company, and Stein's representative filed a bill to protect his exclusive right. Stein's grant was from the sovereign authority of the State, yet this court held that the contract did not prevent the city from granting a similar privilege to other persons during the twenty years, so long as the particular system and source of supply belonging to Stein were not invaded. In other words, the grant to Stein included only the exclusive right to a designated source of supply and to the employment of the particular instrumentalities adopted by him for the distribution of the water from that source.

In the cases cited and discussed, the courts refused to countenance the doctrine of implied authority to grant exclusive franchises even where such implications were within the reasonable intendment of the express grants, acting on the broad presumption, founded on a wise public policy, that a State withholds for the benefit of the people all that it does not grant in unmistakable terms, and does not intend to deprive itself of the power to perform its duty to the public.

If, for reasons of public policy, therefore, implied authority can not be read into a valid grant, *a fortiori* a "reasonable intendment" can not save an otherwise *ultra vires* contract made by the city of Dawson.

The court below found (Master's Conclusions of Law, No. 2, subd. 4) that the city did not *expressly* agree to deprive itself of the power to erect its own system of water supply, but decided that by "implication and reasonable intendment" it had agreed to do so.

The law does not use its force in upholding unlawful contracts, and an agreement by a municipality in contravention of the public welfare is void and confers no legal obligation, and to imply such a promise by the city is repugnant to the fundamental rule that the law will never imply any agreement or create any obligation in a contract contrary to law (Curtis *vs.* Fiedler, 2 Black, 478; Cary *vs.*

Curtis, 3 How. 236; Bryan *vs.* Page, 51 Tex. 535; Brady *vs.* New York, 16 How. Pr. 432), and a promise will not be implied against a municipal corporation where it could not contract expressly. Detroit *vs.* Robinson, 38 Mich. 108; Burrill *vs.* Boston, 2 Cliff. 590; Berka *vs.* Woodward, 125 Cal. 119; Zottman *vs.* San Francisco, 20 id. 105.

In Jackson County Horse R. Co. *vs.* Interstate Rapid Transit, 24 Fed. 306, Kansas City had granted to the grantor of the first-named company the exclusive right for twenty-one years for railways along the streets of the city. Subsequently the city granted to the Interstate Rapid Transit Company the right to operate railroads through certain streets occupied by the other company. This court held that the grant which purported to give an exclusive privilege was beyond the powers vested in the city and void. In rendering the opinion, Mr. Justice Brewer said (p. 309):

> "And if a direct grant from a legislature carries no implication of exclusiveness, why should it be presumed that the legislature intended to vest in a city the power to give exclusive privileges when it has in terms granted no such power? Will the power to create monopolies be presumed unless it is expressly withheld; that would reverse the settled rule of construction, which is that nothing in the way of exclusiveness or monopoly passes, unless expressly named. It will not do to say that the grant of general supervision and control of the streets carries with it, by implication, the power to give exclusive privileges, for that grant implies a vesting in the city of continuous control. It has no authority for surrendering its constant supervision and management to any other corporation or individual. It implies that the city today, tomorrow, and so long as the grant remains, shall exercise its constant judgment as to the needs of the public in the streets, a thing that it may today surrender to the individual or to a private corporation the right of determining a score of years hence what the public may then

> need. . . . It is doubtless true, as counsel says, that capital is timid, and will not undertake such enterprise without abundant guaranties and undoubted security. But this suggests matters of policy, and presents considerations for the legislature. It does not aid in determining what powers have been granted, or in the construction of charters and ordinances. When the legislature deems that the public interests require that cities should be invested with powers to grant exclusive privileges, it will say so in unmistakable terms, as it has already done in some instances. Till then the courts must deny the possession of such power."

After referring to authorities, the justice concluded as follows (p. 310):

> "My conclusion, then, is that so much of the ordinance as purported to give exclusive privileges to the lessor or complainant was beyond the powers vested in the city of Kansas, and therefore void. It has no right, therefore, to challenge the validity of the ordinance giving defendant its privileges or to restrain defendant from building its road. Whatever of annoyance or inconvenience the latter's road may cause, passes among those consequential injuries which give no cause of action. It must suffer these just as the citizen who uses the street where its road is constructed suffers some annoyance and inconvenience, and occasional loss, still without any action against it. *Pro bono publico* all must suffer somewhat."

A person dealing with a municipal corporation is presumed to have knowledge of its powers, and is not entitled in law or equity to enforce any illegal contract made by the city. Gamewell *vs.* Laporte, 96 Fed. 664; Griswold *vs.* East St. Louis, 47 Ill. App. 482; Johnson *vs.* Indianapolis, 16 Ind. 227; Madison *vs.* Newsome, 39 Fla. 149; Suburban Electric *vs.* Hempstead, 38 N. Y. App. 359; Wallace *vs.* San Jose, 29 Cal. 180; Argenti *vs.* San Francisco, 16 Cal. 283.

Even negotiable municipal bonds where the power to issue never existed are invalid in the hands of innocent purchasers. Anthony *vs.* Jasper, 101 U. S. 693; Wells *vs.* Supervisors, 102 id. 625; Dixon *vs.* Field, 111 id. 83; Sutliff *vs.* Commissioners, 147 id. 230; Coffin *vs.* Commissioners, 6 C. C. A. 288; Daniel Neg. Inst., 5 ed. 1538.

A contract by a corporation which is *ultra vires* in the proper sense is wholly void and of no legal effect, the objection not being merely that the corporation ought not to have made it, but that it *could not* have made it. Such a contract can not be ratified by either party because it could not have been authorized by either, and no performance on either side, or action by the courts, can infuse such life into the contract as to found any right of action upon it, and if one of the parties refuses to proceed with a continuing contract which it had no power to make, no authority can be found under which it can be compelled to proceed. Pa. R. R. Co. *vs.* St. L. A. & T. H. R. R., 118 U. S. 317; Cent. Transp. Co. *vs.* Pullman, 139 id. 59; Cal. Bank *vs.* Kennedy, 167 id. 368; Jacksonville Ry. Co. *vs.* Hooper, 160 id. 524; McCormick *vs.* Market Bank, 165 id. 549; Pearce *vs.* Madison & Ind. R. R. Co., 21 How. 441; Zottman *vs.* San Francisco, 20 Cal. 106; Richardson *vs.* Buhl, 77 Mich. 632; Reese Ultra Vires, 68–78; Morawetz Corp. 581; and the word "unlawful" as applied to the purposes and acts of a corporation is not used exclusively in the sense of *malum in se* or *malum prohibitum*, but also to designate such powers as are *ultra vires*. See People *vs.* Chicago Gas, 130 Ill. 292. This doctrine also obtains in England. See cases cited in Cal. Bank *vs.* Kennedy, 167 U. S. 368. These authorities refer largely to private corporations which are voluntary organizations for individual profit of its component members. If no remedy can be found to force such aggregations to perform, under any circumstances, void agreements made for individual gain, but turning out unproductive, how, then, can justice fasten upon a municipality—an involuntary organization of

all the inhabitants within certain limits, including the lame, halt and blind, the insane as well as the sane, and infants as well as adults—an improvident, illegal, and exorbitant contract, in the very performance of which is involved a menace to the health, property and prosperity, of its people?

The court below refused to decide whether the city could grant to a third person the right to supply water, but held that equity would not permit the city, in view of its contract, to itself compete with the water company. This decision is not in harmony with the opinion of Mr. Justice McKenna, in the Joplin case (191 U. S. 156), where such a contention is effectually disposed of. After analyzing the position taken by the circuit court, the justice said:

> "The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied. The appellee . . . contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may not seek to compete with it, and if the city can not, the city is left with a useless potentiality, while appellee exercises and enjoys a practically exclusive right."

The decision of the court below on this question is repugnant to public policy as manifested by the fundamental law of Georgia, and of the other States, as construed by the courts. Even where a State or municipality may grant a privilege which excludes competition from other parties, it does not deprive itself of its power to fulfill the object of its creation—the service of the public. Lehigh Water *vs.* Easton, 121 U. S. 392; Bienville Water *vs.* Mobile 186 id. 212; Skaneateles *vs.* Skaneateles, 184 id. 363; Joplin *vs.* Mo., 191 id. 156; Westerly *vs.* Westerly, 80 Fed. 611; Long *vs.* Duluth, 49 Minn. 280; Brenham Water *vs.* Brenham, 67 Tex. 542; Columbus Gas *vs.* Columbus, 50 Ohio St. 65; Church *vs.* New York, 5 Cow. (N. Y.) 540; and any contract which disables a corporation from performing the functions which it undertakes is void as against public policy.

Thomas *vs.* R. R., 101 U. S. 71, 82; Cent. Transp. Co. *vs.* Pullman, 139 id. 43; Cal. Bank *vs.* Kennedy, 167 id. 368; Wabash *vs.* Defiance, 167 id. 100; Macon St. Ry. *vs.* Macon, 112 Ga. 782; Dillon Mun. Corp. 97.

We say then that, whatever liability may have attached against the unfortunate city under one portion of the divisible contract, there is no jurisdiction, no exclusive franchise requiring protection of a court of equity, and the decree and judgment of the circuit court should be reversed and the bill dismissed.

Res Judicata.

A right distinctly put in issue and directly determined by a court of competent jurisdiction can not be questioned in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right once so determined must, as between the same parties or their privies, be taken as conclusively settled so long as the judgment in the first suit remains unmodified. This is the settled rule of *res judicata* as evolved from the numerous decisions of this court. S. P. R. R. Co. *vs.* U. S., 168 U. S. 1; N. O. *vs.* Citizens Bank, 167 id. 371; Lumber *vs.* Buchtel, 101 id. 638; Last Chance *vs.* Tyler, 157 id. 683; Stout *vs.* Lye, 103 id. 66; Cromwell *vs.* Sac, 94 id. 351; Des Moines *vs.* Iowa, 123 id. 552; Tioga *vs.* Blossburg, 20 Wall. 137; Cornett *vs.* Williams, id. 226; Aurora *vs.* West, 7 id. 82; Beloit *vs.* Morgan, id. 622; Linton *vs.* National, 104 Fed. 584; Holt *vs.* National, 80 id. 686; Commissioners *vs.* Platt, 79 id. 567.

The decisions of the State courts construing the local laws are binding on this court, whatever it may think of their soundness on general principle (Jeter *vs.* Howitt, 22 How. 352; Bank *vs.* Beverly, 1 id. 134, 148; Stanley *vs.* Coler, 96 Fed. 284; Oxford *vs.* Union Bank, id. 293), and the proceedings of a State court can not be collaterally attacked in the Federal jurisdiction. Tarver *vs.* Tarver, 9 Pet.

174; Fouvergne *vs.* N. O., 18 id. 473; Christmas *vs.* Russell, 5 Wall. 305; Peninsular *vs.* Eells, 68 Fed. 35.

By a judgment of a court of competent jurisdiction, the vitality of a contract is merged into the judgment; it ceases to bind the parties and all remaining liability is transferred to the judgment. No further action can be maintained on the instrument. Wayman *vs.* Cochrane, 35 Ill. 151; Leslie *vs.* Bonte, 130 id. 501; Freeman Judg., 216.

The judgment of the court in a suit for one instalment under a contract is conclusive with regard to the other instalments (Lumber *vs.* Buchtel, 101 U. S. 638), and so in a suit for railroad receipts with reference to subsequent tolls under the same contract. Tioga *vs.* Blossburg, 20 Wall. 137.

In New Orleans *vs.* Citizens Bank, 167 U. S. 371, the bank obtained a judgment in the State court, declaring that a tax assessment for a certain year was void. The successors in office to the board of assessors assessed a similar tax for a subsequent year. In a suit in the U. S. Circuit Court the bank set up the State court judgment as constituting *res judicata*. The tax collectors contended that though successors in office they were not privies to the former suit, and that there was no estoppel because a judgment decreeing the assessment for one year illegal could not be *res judicata* as to a future year. This court held that the contention based upon a mere change in persons was without merit, and that the estoppel resulting from the thing adjudged did not depend upon the same demand. After reviewing leading cases, Mr. Justice White, in speaking for the court, said:

> "It follows, then, that the mere fact that the demand in this case is for a tax for one year and the demands in the adjudged cases were for taxes for other years, does not prevent the operation of the thing adjudged, if, in the prior cases, the question of exemption was necessarily presented and determined upon identically the same facts upon which the right of exemption is now claimed.
>
> . . . . . .

> The very essence of judicial power is that when a matter is once ascertained and determined it is forever concluded when it arises again under the same conditions between the parties or their privies. To admit judicial power on one hand and to deny on the other the very substance and essence of such power, is not only contradictory but destructive of the fundamental conceptions upon which our system of government is based."

The universal rule of *res judicata* is affirmed in paragraph 5233 of the Code of Georgia as follows:

> "A judgment is conclusive between parties and privies as to the matters directly in issue until reversed or set aside."

Privity.

The court below found in effect (Master's Conclusions of Law, No. 2, subd. 1) the rule of *res judicata* as we have stated it, and also that the judgment of the Supreme Court of Georgia was competent to conclude parties and privies (Stanly *vs.* Coler, 96 Fed. 284; Oxford *vs.* Union Bank, id. 293), but held that complainant did not acquire its right to litigate through the assignment of water rentals, made subsequent to the date of said judgment, but by virtue of the mortgage from the water company, given prior to the filing of the suit, and was therefore not privy to the State court suit so as to be concluded thereby, citing as applicable the rule that a mortgagee is not bound by a judgment against a mortgagor in a suit begun since the mortgage was made, unless mortgagee was a party or was represented by authority in the litigation. The general rule is as was stated, and it is axiomatic that if a mortgagee is not represented in a suit by the mortgagor the resulting judgment can absorb only the interest of mortgagor in the subject-matter of the suit, and can not impair any title or interest which passed by the mortgage from and *beyond the control* of mortgagor prior to the suit.

The governing principle of the rule, however, has been and can in reason only be applied to protect such fee or lien conveyed by the mortgage as could not be recovered or discharged, impaired or diminished, by any act of the mortgagor or of his creditors, such as actually existed in the cases cited by the court below.

If, therefore, the complainant acquired by its mortgage, subject only to discharge by the satisfaction of the entire debt secured, a permanent, unconditional, and indefeasible vested lien on the water rentals to accrue, and, without any action on its part or on the part of the mortgagor, the right in law to collect the rentals as they accrued, and was not in law represented in the State court suit, then the application of the rule by the court was just, as such right could not have been merged into the judgment.

On the contrary, (1) if the mortgage did not invest complainant, without foreclosure, assignment by the water company, or notice to the city, the right to collect the water rentals as they accrued, or, (2) if such right was invested, but nevertheless with complainant's approval, the water company, being in possession of the water system, was also left in control of the water rentals, or (3) if the lien on the rentals was discharged *pro tanto* by the payment of the interest accruing prior to the assignment of the rentals, then the complainant was bound by the judgment of the State Supreme Court, if not as party by representation, certainly as successor by the assignment of the cause of action, made subsequent to the date of the judgment.

In arguing this proposition we shall apply the law to such facts as are either set forth in the bill or not denied by complainant.

In the contract between the city and the water company the city agreed to attorn to such trustee for its bonds as the company might subsequently elect. There was never any actual attornment to the complainant, and if any contractual relation between it and the city was created through this

contract and the subsequent mortgage given by the company, it was never brought home to the city, since it never received any notice that complainant had acquired the right to collect the rentals. The contract left it optional with the water company to remain payee of the rentals to accrue, or to make the trustee to be created payee thereof.

The contract between the company and complainant is contained in the four corners of the mortgage given by the former to the latter. This court will undoubtedly give this mortgage legal effect, in accordance with the intention of the parties as manifested at the time, and prior to the filing of the bill. The parties will be presumed to have had in view that, under the laws of Georgia, a mortgage passes no title, and is regarded both in law and equity as merely a security for the debt incurred. Freeman *vs.* Bass, 34 Ga. 355; Frost *vs.* Allen, 57 id. 328; Hodge *vs.* Brown, 81 id. 277; Holliday *vs.* Lowry, 92 id. 680; Ward *vs.* Lord, 100 id. 408; Georgia Code, 1954 (2723); Huguley Mfg Co. *vs.* Galeton Mills, 94 Fed. 269; and that the lien of a mortgage is discharged by payment of the debt secured. Howard *vs.* Gresham, 27 Ga. 347; Brayley *vs.* Ellis, 71 Ia. 156; Olcott *vs.* Crittenden, 68 Mich. 230.

Where a mortgage is not deemed a conveyance of title so as to enable the mortgagee to recover possession without foreclosure and sale, the mortgagee has no right to take the rents before he has secured possession by actual foreclosure and sale according to law; and it is not in the power of the parties, even by express stipulation to give him such right (Thompson *vs.* Shirley. 69 Fed. 484). Instead of assigning the rentals to complainant or making it payee thereof in the mortgage, the right to the rentals was conveyed to complainant merely as security for the debt (Jones, Mort. 140), and having been expressly so done, the conveyance for security can not be construed as making the mortgagee the actual payee of the rentals (69 Fed. 484; Central Trust *vs.* Wabash, 30 id. 333). Under the instrument it was obvi-

ously within the intention of the parties that the water company was to be left in complete control, not only of the water system, but also of all rentals to accrue, and that the right of the complainant to collect the rentals would only accrue in case of default.

Furthermore, according to the bill, the city only agreed to pay rentals covering the twenty-year period from 1891 to 1911, while the mortgage debt incurred by the water company will not become due until September, 1916. It must be assumed that the parties acted in good faith and believed at the time that there would be no default either by the water company or the city, and, therefore, it was within their expectation that the water rentals would all be collected and disposed of long before the principal of the mortgage debt would be due. Prior to September, 1916, then, the only duty required of the trustee by the mortgage was to collect the accruing interest on the bonds. The resolution of the water company, recited in its mortgage to complainant, specifically provided that the water rentals were to be applied in payment of the interest on the bonds, and that the excess thereof, over the amount required for the interest, was to go to the treasurer of the water company. No other reasonable construction can be given to the intention of the parties than that the rentals were mortgaged to secure the payment of the interest, and for that purpose only, and that the mortgagor was to collect the rentals and apply them to its own uses so long as there was no default in payment of interest. Freedmen's S. & T. *vs.* Shepherd, 127 U. S. 494; Wilder *vs.* Houghton, 1 Pick. Mass. 90; Doug. 21.

This intrinsic construction of the mortgage is also supported by extrinsic evidence. The immediate subsequent construction of the instrument by the parties themselves should have controlling weight. At no time did the complainant give notice to the city, or set up any right to collect rentals, while at all times the water company claimed and

actually collected rentals until payment was demanded and refused in 1895. It brought suit for the instalments alleged to have accrued during said year, and constantly demanded the rentals until the adverse decision of the Supreme Court was rendered, whereupon the company promptly assigned a litigated right to complainant.

If the mortgage of the rentals was to secure payment of the interest on the bonds, the corollary is that payment of interest extinguished the lien as to any right to collect rentals which had already accrued (Howard *vs.* Gresham, 27 Ga. 347). From any point of view, the complainant could not have been clothed with the right to collect the rentals without notice to the city, foreclosure, or assignment by the company. It was in privity with the company because the relationship to the right to collect was mutual and successive. Central *vs.* Hazard, 30 Fed. 484; Bate *vs.* Gillett, 30 id. 687; Adams *vs.* Barnes, 17 Mass. 367; Leslie *vs.* Bonte, 130 Ill. 498; O'Connell *vs.* Chicago, 184 id. 324; 2 Black Judg. 549, 550; Freeman Judg. 162; Bigelow Estop. 142; 3 Bouvier Inst. 373; Herman Estop. 143–5; 1 Greenl. Ev. 523. The right of action did not spring from the mortgage. Whatever there was of it came through the assignment by the company. If the assignment was not wholly made after the decision of the Supreme Court of Georgia it was certainly until then incomplete.

When the bill was filed, complainant, as trustee for the bondholders, had no accrued money demand either against the water company or the city; all accrued interest on the bonds had been paid, and the court below so found (Master's Concl. of Law, No. 2, subd. 7, pr. rec. 110). It is not denied that the complainant took the naked assignment from the water company and undertook the suit, not at the instance of the bondholders, but upon the request of the water company and the American Pipe Manufacturing Company. If complainant had already, by virtue of the mortgage, an accrued legal demand as alleged, why was it deemed neces-

sary to secure an assignment before filing suit? Notwithstanding the admitted facts, it was successfully contended in the court below that there was neither mutual nor successive relationship between the water company and complainant to the right to the rentals. The interest in the right being identical, it is self-evident that both parties were estopped by the judgment. Having at the time of filing no accrued independent right of action, complainant's suit was without foundation.

The bill filed in this case was necessarily based upon the assumption that the proceedings in the Supreme Court of Georgia were a nullity. It is a bald attempt indirectly to bring within the jurisdiction of the Federal courts a question which, under the decisions of this court, can not be examined by them.

Even if the rentals had been conveyed as a security for the whole debt, and, conceding *arguendo*, the exaggerated claim of position of complainant as "alternative payee," which in any case was subordinate until asserted and recognized, still the judgment ought to be conclusive, since it is well established that where a mortgagee lies by and suffers the mortgagor, in possession, to remain in control, he is bound by the acts of the mortgagor until he intercepts the rentals (Wilder *vs.* Houghton, 1 Pick. Mass. 90, Doug. 21; Keyser *vs.* Hitz, 4 Mackey, D. C. 179), and the mortgagor is considered as agent, by implied authority, to receive the rents to pay the interest. Wilder *vs.* Houghton, 1 Pick. Mass. 90, Doug. 21. To the world except the mortgagee, the mortgagor is regarded as the owner of the mortgaged property, and as such is entitled to all the rents, even after default, until they are intercepted. Comer *vs.* Sheehan, 74 Ala. 452; Long *vs.* Wade, 70 Me. 359; Noyes *vs.* Rich, 52 id. 117; Argall *vs.* Pitts, 78 N. Y. 243; Bridge *vs.* Heidelbach, 94 U. S. 800. As the rent contract existed at the date of the mortgage, the complainant can only have the rights of the water company against the city. Jones Mort. 773, 774.

Where the rentals are specifically pledged as part of the security, the mortgagee has no claim upon them until he intercepts them by proper procedure. To avoid privity the rent must be actually assigned in the mortgage, and if the mortgage was given subsequent to the rent contract, as in the case at bar, attornment or at least notice would be necessary. Trulock *vs.* Donahue, 85 Ia. 748.

In Freedman's S. & T. Co. *vs.* Shepherd, 127 U. S. 494, it was decided that even though the income was pledged as security, the mortgagee had no right thereto until the mortgagor failed to perform the conditions of the mortgage.

In Gilman *vs.* Illinois, 91 U. S. 603, the railroad company gave mortgages to secure the bonds, quite similar to that given by the water company. It conveyed its roads, property, and franchises, "together with the tolls, rents, and profits," and the mortgagee was given power, upon default in interest, to take possession of all property conveyed. The company defaulted, but instead of taking possession as provided, the mortgagee foreclosed. A creditor of the company attached the rents and profits, and this court held that it thereby acquired a superior lien because the rents and profits rightfully and legally belonged to the mortgagor so long as he retained the legal title to the property and the right of possession; that, having failed to take possession, the accrued rentals were just as liable to the creditors of the mortgagor as if no mortgage existed. Notwithstanding the rentals were pledged, the mortgagee had no right thereto until he took possession. Mr. Chief Justice Swayne, speaking for the court, said (p. 616):

> "The mortgagor of real estate is not liable for rent while in possession. 2 Kent Com. 172. He contracts to pay interest, and not rent. In Chinnery *vs.* Black, 3 Doug. 391, . . . Lord Mansfield said, 'Until a mortgagee takes possession the mortgagor is owner to all the world, and is entitled to all the profit made.' . . . Possession draws after it the right to receive and apply the income. . . . It was for the com-

> pany to decide what should be done with it. In this condition of things the whole fund belonged to the company and was subject to its control. It was, therefore, liable to the creditors of the company as if the mortgages did not exist."

To similar effect, see Galveston *vs.* Cowdrey, 11 Wall. 459; Silverman *vs.* Northwestern, 5 Ill. App. 129; M. V. R. R. *vs.* U. S. Express, 81 Ill. 535; Curtis *vs.* Millard, 14 Ia. 130; Noyes *vs.* Rich, 52 Me. 115; Am. Bridge *vs.* Heidelbach, 94 U. S. 798.

It will hardly be contended that complainant's mortgage is stronger in legal effect than the ones involved in the case of Gilman *vs.* Illinois, cited *supra.* In that case, the mortgagee's interest, as well as the mortgagor's, in the rentals was merged into the creditor's judgment, though the mortgages were made prior to the judgment, and it follows that in the case at bar the relative right of the complainant and the water company was merged into the judgment favorable to the city. Wayman *vs.* Cochrane, 35 Ill. 151; Leslie *vs.* Bonte, 130 id. 501; Freeman Judg. 216. From a legal standpoint we can not conceive how the merger in one case could have a different effect from that in the other; the underlying principle is that the rentals belonged to the mortgagor and were subject to judgments against him. If complainant's claim to the rentals could have been defeated by the intervention of a creditor's judgment against the mortgagor, obtained since the mortgage passed, then it was inevitably absorbed by the judgment favorable to the city.

The principal difference between the judgments in the Gilman (and other cases) and the one under discussion, gives superior force to the judgment obtained by the city. In those cases, the *lien of the mortgagees* on rentals *had not been satisfied by payment of the interest* on the bonds. In the case at bar the *lien*, to say the least, is *naked*, the interest having been paid.

As we understand it, the rule of mutuality is that a judg-

ment must equally estop both parties or neither. 2 Black Judg. 548–9; Greenl. Evid. 524; Bouv. Inst. 2932, 3102; Litchfield *vs.* Goodnow, 123 U. S. 552. Applying this rule, and supposing the judgment had been in favor of the water company, would not the city have been concluded upon the issues decided? Could a taxpayer subsequently test the same question?

We say that, from every point of view of the law as applicable to the actual facts, the complainant was bound to the same extent that the water company was by the decision of the Supreme Court.

Stare Decisis.

In the suit between the water company and the city, the State Supreme Court held (106 Ga. 696–737) that the ordinance and notice for the election held on June 11, 1886, were insufficient to authorize a contract incurring an indebtedness. The court below found as a matter of fact (Master's Findings of Fact, No. 1, pr. rec. 85) that said election was not in the contemplation of the parties to the contract, and constituted neither authority nor inducement therefor. It is reasonable, therefore, to assume that the contention of complainant to the contrary will not be insisted on in this court, and we will take it as settled that the former city council entered into the contract without any popular sanction.

In the State court suit the question arose whether by the contract a debt was incurred which was forbidden by par. 1, sec. 7, or par. 1, sec. 10, of article 7 of the State constitution of 1877. Par. 1, sec. 7, reads as follows:

> "The debt hereafter incurred by any county, municipal corporation, or political division of this State, except as in this constitution provided for, shall not exceed seven per centum of the assessed value of all the taxable property therein, and no such county, municipality or division shall incur

> any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose, to be held as may be prescribed by law; but any city, the debt of which does not exceed seven per centum of the assessed value of the taxable property at the time of the adoption of this constitution, may be authorized by law to increase, at any time, the amount of said debt, three per centum upon such assessed valuation."

Par. 1, sec. 10, reads as follows:

> "Municipal corporations shall not incur any debt until provision therefor shall have been made by the municipal government."

We shall direct our attention not so much to these provisions as to the decision of the Supreme Court, which is the constitution as applied to the contract, said court being the highest tribunal for the interpretation of the organic law of the State.

The case was argued and reargued, and we do not think in the history of judicial procedure in the State will be found a case where any question was more thoroughly and conscientiously analyzed and considered.

The gist of the decision is as follows:

> 1. Without preliminary sanction of a popular vote, as required by the constitution, a municipal corporation can not contract for a supply of water on the credit of the city for a longer period than one year; and a contract, which by its terms is to run for twenty years, each year's supply to be paid for semi-annually, is operative from year to year so long as neither party renounces or repudiates it.
>
> 2. Even if no legislation is necessary to authorize a municipal corporation to hold an election to determine whether a debt other than a bonded indebtedness shall be incurred, an election held pursuant

to an ordinance and notice, which do not state the amount of debt to be incurred, will not be sufficient to authorize a contract incurring an indebtedness.

3. Where one enters with a municipal corporation into a contract which is void because opposed to the constitution and laws of this State and contrary to its settled public policy, complete performance on the part of such person will not prevent the municipal corporation from pleading its want of power or the illegality of the contract.

4. The city has the right to make a contract for water supply for one year, provided it has in the treasury a sufficient sum to pay therefor, or if such sum can be secured by lawful taxation levied during the year in which the contract is made. While a contract for a longer period is illegal, yet, where the other party to such a contract has complied with his part, the city is liable for the amount stipulated in the contract for each year that it received the benefits thereof.

In arriving at these conclusions, the court exposed the underlying foundations of the constitutional prohibition, going far into the history of the conditions which led the framers of the constitution to prohibit municipalities from further imposing public burdens without popular sanction. It was shown that towns and cities in the State had, prior to the adoption of the constitution, been recklessly and improvidently loaded with debts, and that the very object of the people so burdened, speaking through the constitution, was to place a check upon the power of municipalities to incur such debts as that contemplated in the contract with the water company. The substructure of the decision may be summarized as follows:

1. That the word debt as used in the constitution is a liability which is undertaken and which must be discharged in future, but which is not to be discharged by a tax levied within the year in which the liability is undertaken.

2. That the very purpose of the framers of the constitution was to prevent an accumulation of lia-

bilities upon municipal corporations which could be enforced in the future by compulsory levy of taxes.

3. That the policy of the constitution was not only against incurring liabilities to be discharged in the future for services rendered concurrently with the liability incurred, or previous thereto, but equally against the incurring of a liability which is to be discharged in future, notwithstanding it may depend upon the performance of a service to be rendered in the future, and that an undertaking creates a debt within the meaning of the constitution if thereby the opposite party to the contract can, of his own volition, and without the consent and over the protest of the municipality, place upon it a liability which must be discharged by a tax levy in the future.

4. That without popular sanction, a municipality can not anticipate and fix liabilities beyond one year, or make any contract in which the other party would have the right by simple performance, to demand from year to year a discharge of the obligation, otherwise the framers of the constitution did only a vain and idle thing in placing the prohibition in the fundamental law.

5. That the very purpose of the constitution was to provide a system of finance for subordinate public corporations under which there should be each year contracts made for the expenses of the year, and each year's expenses should be paid by taxes levied during the year, and to prohibit, without popular sanction, any liability not to be discharged by money already in the treasury, or by taxes levied during the year.

The court also exhaustively reviewed its own decisions rendered since the adoption of the constitution, covering a period of twenty years, in which the question of prohibited indebtedness was raised, and reached the conclusion that its decision was not opposed to any previous decision rendered by it. It is true that the court overruled in part two of its previous decisions on the question, but it will be noted that they were on the same side of the question but applied more rigorously the inhibition.

The court below (Master's Concl. of Law, No. 2, subd. 2, pr. rec. 103) conceded that subsequent to the date of the contract in question, and beginning in 1892, the Supreme Court had unequivocally held that, without the required popular sanction, such contracts as the one in issue created debts prohibited by the State constitution, as illustrated in the cases of Cartersville Co. *vs.* Cartersville, 89 Ga. 683; Cartersville Water *vs.* Cartersville, id. 689; Lewis *vs.* Lofley, 92 id. 804; Habersham *vs.* Porter, 103 id. 613; Dawson *vs.* Dawson Water, 106 id. 696.

Then there is no dispute that this chain of decisions is in perfect harmony and governed by the same letter and spirit, and during the seven year period covered no decision could be found which deviated from the rule laid down. Inasmuch as these decisions were in construction of the fundamental law which had existed since 1877, the rule of *stare decisis* established became impregnable (Wells Adj. 597, 599, 602; Wilson *vs.* Ward Lumber, 67 Fed. 683), unless it can be shown that an *opposite* rule existed at the date of the contract in question. Stanly *vs.* Coler, 96 Fed. 284; Oxford *vs.* Union Bank, id. 293.

The court below found (Master's Concl. of Law, No. 2, subd. 2, pr. rec. 99–103) that the decisions in Georgia prior to the date of the contract had oscillated, and for this reason the later decisions were not binding on the Federal courts, and furthermore (id. 3) that such a contract did not create a debt was not an open question in that form, citing Walla Walla *vs.* Walla Walla Water, 172 U. S. 1, as *conclusive* (pr. rec. 104). This latter proposition is wholly new to us, and after exhaustive research we have been unable to find any case wherein it was held that the decision of this court construing a law of one State was conclusive in construing the constitution and settled policy of another. The right of each State to enact its own laws and formulate its own local policy was reserved in the Federal Constitution, and such right includes that to have them con-

strued by its own courts, and this right we believe will be recognized and upheld by this court. Wheaton *vs.* Peters, 8 Pet. 591; Smith *vs.* Kernochen, 7 How. 219; Pa. *vs.* Wheeling, 13 id. 519; Fairfield *vs.* Gallatin, 100 U. S. 47; Claiborne *vs.* Brooks, 111 id. 410; Bucher *vs.* Railroad, 125 id. 584; Detroit *vs.* Osborne, 135 id. 499. We are willing to concede to the citation the weight of the argument therein contained, and that the same chain of reasoning might lead the court to a similar conclusion in this case, provided the *manifested* policy of Washington is the same as that of Georgia; but we can not admit that the decision in that case precludes us from asking this court to determine the issue presented here in accordance with the constitution of the State under which it arose, it having held that different interpretations may be given in different States of laws even of a common prototype. Claiborne *vs.* Brooks, 111 U. S. 411; Randolph *vs.* Quidnick, 135 id. 463; Dempsey *vs.* Oswego, 4 U. S. App. 435; Christy *vs.* Pridgeon, 4 Wall. 203. In the Walla Walla case this court was not construing the settled policy of Washington as illustrated by the decisions of the State court construing a constitutional inhibition, but merely a limitation of indebtedness contained in the charter of the city of Walla Walla which had been expressly authorized by the charter to make the water contract which was in question, and the contract seemed reasonably within the declared purpose of the legislative grant.

Neither can we accept the court's interpretation of the Georgia decisions rendered prior to the date of the contract. It seems to us that the decisions themselves were misconceived, and if such analysis thereof had been made by complainant's counsel, we would have said that it is unfair.

The Constitution was adopted in 1877. The question of prohibited debt first came before the State Supreme Court in the case of Hudson *vs.* Marietta, 64 Ga. 286, which was decided May 7, 1879, in the atmosphere of the constitu-

tional convention. The court held that the city had no authority, without popular sanction, to incur a debt of $3,000 in order to exchange an old fire engine for a new one. Explaining the purpose of the framers of the constitution, the court said (p. 288):

> "The provision is inserted therein to stop, to dam up, this deluge of city and county debts which is flooding the country and sinking the best interests of the people."

The question next came up in Spann *vs.* Webster County, 64 Ga. 498, decided December 6, 1879, when it was held that the county could not levy a tax to buy a safe without the required popular assent. With regard to the object of the prohibition, the court said in part (p. 501):

> "It was the purpose of the framers of that constitution to tap the root of that system of indebtedness by counties, cities, and towns, which was growing into immense proportions and spreading mildew and blight everywhere over the land."

This decision was also rendered within the influence of the convention, and the court may have been over-zealous to apply the letter of the prohibition. At least the Supreme Court, in the case of the Water Company *vs.* Dawson, was more liberal, and in order to bring about uniformity, overruled in part, or qualified this decision, by saying that the safe might have been bought if it could have been paid for with surplus funds, or from a legal tax levied during the year of purchase.

In Butts *vs.* Little, 68 Ga. 272, it was held that a contract without popular sanction was void which provided for the erection of a building at a specified price, the payments for which were to be made as the work progressed, where the amounts were more than could be lawfully raised by taxation. After so deciding, however, the court set up a hypothetical case, and said that if the building could be paid for

in annual instalments by lawful levy, the injunction might be altered to meet the modification.

In Cabaniss *vs.* Hill, 74 Ga. 845, the court held that a contract was unlawful which created a debt in which the contractors agreed to accept $3,510 in warrants on the county treasurer in payment for doors, cells, sewer pipes, etc. This seems to have been another extreme interpretation of the inhibition, practically on all fours with the case of Spann *vs.* Webster County, *supra*, and it was qualified to the same extent in Dawson Water Co. *vs.* Dawson.

As oscillations the court cited the cases of Rome *vs.* McWilliams, 67 Ga. 106 ; Conyers *vs.* Kirk, 78 Ga. 480, and Lott *vs.* Waycross, 84 Ga. 681. In the first-named case the court was asked to enjoin a lawful levy of taxes to cover *anticipated* expenditure. No debt was created or intended to be created, and the assessment was for the purpose of avoiding an indebtedness. Strictly in accordance with the principle also laid down in the Water Company *vs.* Dawson, the court refused the injunction and held that there was no attempt to create an indebtedness. In the second case the court simply decided that a cash contract for lamps and gasoline, amounting to $57.10, was binding, having been made by the appropriate committee, which purchased the goods for cash. They were not paid for because the city treasurer happened to be out of town. It is obvious that the controlling principle in this case was the same as that in the Water Company *vs.* Dawson. The third case must be excluded from consideration by the very rule laid down by the court below, since the decision was rendered not before but subsequent to the date of the contract between the water company and the city. Besides, though the court was dealing with a ten-year contract, it only decided that the light company, having, under its contract, furnished the required lights, the city would not be enjoined from paying for the service out of the tax levied *during the year in which the water was used*, and this is just

what was also decided in the Water Company *vs.* Dawson. One Albertson had applied for an injunction to prevent the city from paying for the lights, and in disposing of the case the court expressly refused to decide whether the contract incurred an indebtedness which should have been submitted to the voters of the town, because it was not necessary to the adjudication of the case. See, also, Ford *vs.* Cartersville, 84 Ga. 216.

It will be seen that, barring Butts *vs.* Little, the governing principles of all the decisions are the same as those which controlled the court in Dawson Waterworks *vs.* Dawson. If the court's twenty-year construction is not to be recognized as a true manifestation of the policy of the State, it is because of the inharmonious note contained in the judicial *dictum* in Butts *vs.* Little.

The *exact* question raised by the contract in issue was never decided until August, 1892, but the animus of the constitution was made plain in the earlier decisions, and *the rule established prior to the transaction was more severe than that followed since.* There was never any oscillation as the word has been used by this court. The fact that the inhibitory provision was more unqualifiedly applied prior to the date of the contract in question, surely will not militate against the conclusiveness of the more liberal construction subsequently adopted and maintained. In the earlier decisions, the court below did find here and there *dicta* inconsistent with the practical uniformity of the decisions of the State court, but, as we understand it, that which is actually decided establishes the rule of *stare decisis.* If every such rule is to be impaled by any shaft of opinion not responsive to the issues actually decided, it might well be doubted whether any court has been or will be able to maintain such a rule upon any question so often raised over a long period.

The construction of the constitution of a State by its highest tribunal is regarded as a part of the statute, and is

as binding upon the courts of the United States as the text. Leffingwell *vs.* Warren, 2 Black, 603; Shelby *vs.* Guy, 11 Wheat. 367; McCluny *vs.* Silliman, 3 Pet. 270; Bank *vs.* Daniel, 12 id. 52; Ross *vs.* Duval, 13 id. 45; Harpending *vs.* Church, 16 id. 455; Porterfield *vs.* Clark, 2 How. 76; Luther *vs.* Borden, 7 id. 40; Massingill *vs.* Downs, id. 767; Nesmith *vs.* Sheldon, id. 812; Van Rensselaer *vs.* Kearney, 11 id. 297; Webster *vs.* Cooper, 14 id. 504; Christy *vs.* Pridgeon, 4 Wall. 196; Machine *vs.* Gage, 100 U. S. 677; Post *vs.* Supervisors, 105 id. 667; Claiborne *vs.* Brooks, 111 id. 410; Fisk, 113 id. 720; Detroit *vs.* Osborne, 135 id. 499. This is the general rule and no other could be "adopted with any regard to propriety" (Beauregard *vs.* N. O., 18 How. 502), and—

> "otherwise we should have the strange spectacle of two different tribunals, having coordinate jurisdiction in the same State, differing as to the validity and existence of a statute of that State without any power to arbitrate between them. . . . As a matter of propriety and right the decisions of the State courts on the question as to what are the laws of the State is binding upon those of the United States." Ottawa *vs.* Perkins, 94 U. S. 268.

It has been adhered to with "marked tenacity." Ill. Trust *vs.* Arkansas City, 76 Fed. 279; Madden *vs.* Lancaster, 27 U. S. App. 535. "It belongs to the State courts to expound their own statutes." Smith *vs.* Kernochen, 7 How. 219; Boyd *vs.* Ala., 94 U. S. 649; M'Keen *vs.* Delancy, 5 Cranch. 32. If the highest courts of two States arrive at different conclusions concerning a statute common to both, this court will give preference to the ruling of the court in which the contract was made and to be executed. Randolph *vs.* Quidnick, 135 U. S. 463. It has felt constrained to overrule its own construction to follow that of the State court of which it was not aware in the first instance, notwithstanding the transaction involved was made prior to the decision

of the State court. Fairfield *vs.* Gallatin, 100 U. S. 47; Green *vs.* Neal, 6 Pet. 291; Nesmith *vs.* Sheldon, 7 How. 818; Suydam *vs.* Williamson, 24 id. 427. It will follow the latest settled adjudications (Wade *vs.* Travis, 174 U. S. 508; U. S. *vs.* Morrison, 4 Pet 124; Polk *vs.* Wendell, 9 Cranch. 98), and regardless of its opinion as to their soundness. Tioga *vs.* Blossburg, 20 Wall. 137; Walker *vs.* State, 17 id. 651. It is the course of duty and prudence, especially in cases of difficult distribution, to yield rather than to encroach. Fullerton *vs.* Bank, 1 Pet. 614. This general rule has been followed from the earliest period (Brown *vs.* Van Braam, 3 Dall. 344; Elmendorf *vs.* Taylor, 10 Wheat. 159) to the present. Fallbrook *vs.* Bradley, 164 U. S. 154; Oakes *vs.* Mase, 165 id. 364; Aberdeen *vs.* Chehalis, 166 id. 444; Forsyth *vs.* Hammond, id. 518 (Burgess *vs.* Seligman distinguished, p. 520); Nobles *vs.* Georgia, 168 id. 404; Sioux City *vs.* Trust Co., 173 id. 107, 112; Wade *vs.* Travis, 174 id. 508 (limitations distinguished, p. 509); M., K. & T. *vs.* McCann, id. 586; Hartford Fire *vs.* Chicago, 175 id. 100–108; Tullis *vs.* Lake Erie, id. 353; Bergman *vs.* Bly, 66 Fed. 43; Andrews *vs.* National Foundry, 76 id. 166; Madden *vs.* Lancaster, 12 C. C. A. 570; Dempsey *vs.* Oswego, 4 U. S. App. 435. In many of these cases single decisions of State courts were followed. The rule has particular force where the State court has construed a constitutional limitation as to debt or the constitutionality of State legislation under which a debt was incurred. Sioux City *vs.* Trust Co., 173 U. S. 112; Wade *vs.* Travis, 81 Fed. 742; Stanly *vs.* Coler, 96 id. 284; Oxford *vs.* Union Bank, id. 293; or local public policy affecting the extent and character of powers of municipalities which are particularly within the domain of State control. Forsyth *vs.* Hammond, 166 U. S. 506; Claiborne *vs.* Brooks, 111 id. 410; Detroit *vs.* Osborne, 135 id. 499; Hartford Fire *vs.* Chicago, 175 id. 91; Sioux City *vs.* Trust Co., 27 C. C. A. 77; O'Brien *vs.* Wheelock, 95 Fed. 905; Stanly *vs.* Coler, 96 id. 284; Oxford *vs.* Union Bank, id. 293.

In 1896, in Fallbrook *vs.* Bradley, 164 U. S. 154, this court held that when a suit is brought by a citizen of another State, claiming that an act is about to be done in violation of the Constitution of the United States, the Federal courts have jurisdiction, but in exercising it as to questions arising under the State constitution, it is their duty to be guided by the decisions of the highest court of the State. Mr. Justice Peckham said (p. 155):

> "We should not be justified in holding the act to be in violation of the State constitution in the face of the clear and repeated decisions of the highest court of the State to the contrary, under the pretext that we are deciding principles of general constitutional law. If the act violate any provision, expressed or properly implied, of the Federal Constitution, it is our duty to so declare it, but if it do not, there is no justification for the Federal courts to run counter to the decisions of the highest court upon questions involving the construction of State statutes or constitutions, on any alleged ground that such decisions are in conflict with sound principles of general constitutional law."

The court below found (Master's Concl. of Law, No. 2, subd. 2, pr. rec. 99–103) that it was under no obligation to follow the general rule, because the decisions of the State court prior to the date of the contract had not established a settled rule, thus leaving the question at large. We think by our analysis of the earlier decisions we establish the contrary, but the decision of the court forces us to assume, for the sake of argument, that in effect no decision was rendered prior to the date of the contract. We shall therefore proceed upon this assumption, believing, as we do, that even in such case the position of the court is untenable and not warranted by any departure of this court from the general rule announced.

The first radical departure from the general rule seems to have been in the case of Gelpcke *vs.* Dubuque, 1 Wall. 175.

In that case the court declined to follow the latest State decision which had overruled a long line of State court decisions, covering a period of six years, which had established a rule of property under which the transaction in question had taken place. The court intimated that it might follow "the latest *settled* adjudications," but—

> "it can not be expected that this court will follow every such oscillation, from whatever cause arising, that may possibly occur. The earlier decisions, we think, are sustained by reason and authority. They are in harmony with the adjudications of sixteen States of the Union. . . .
>
> "The late case in Iowa, and two other cases of a kindred character in another State, also overruling earlier adjudications, stand out, as far as we are advised, in unenviable solitude and notoriety."

The underlying principle of this decision was that where a contract when made was valid in accordance with an existing rule of property, established by the State court, this court would not follow a change of judicial decision which amounted to an alteration of the law and a violation of the contract obligation. Though this departure certainly seemed justified, it evoked a strong dissent from Mr. Justice Miller (pp. 207–220), who charged that it was an advance in the usurpation of the right which belonged to the State courts to decide as a finality upon the construction of State constitutions and State statutes. It also provoked criticism and protest from the State court. McClure *vs.* Owen, 26 Ia. 249–59.

Since that time (1863) numerous further exceptions to the general rule have been made, but if sifted of *dicta*, we think it will be found that the principle which moved the court to make the exception in Gelpcke *vs.* Dubuque is the common foundation for most subsequent limitations. Referring particularly to this court, and not to the circuit courts, we believe that the subsequent leading case of Burgess *vs.*

Seligman, 107 U. S. 20, marks the extreme limit of departure from the rule. In that case, no decision had been made by the State court on the question involved when it came before the United States Circuit Court and was decided. The State court afterwards took an opposite view, and under this particular condition this court followed the prior rule of construction laid down by the circuit court, saying:

> "So when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of decision, or when there has been no decision of the State tribunals, the Federal courts properly claim their right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid any unseemly conflict with the well-considered decisions of the State courts."

It seems plain that what moved the court in this case to decline to follow the State court was not that there had been no decision prior to the transaction, but because the *Federal court had first acquired jurisdiction and construed the law prior to action by the State court*, and if any rule was intended to be laid down by this court it was to the effect that where a Federal court first obtains jurisdiction and decides an issue, a subsequent adverse decision by the State court will have the effect only of setting the question at large to be decided independently of precedent, though leaning toward an agreement of views with the State court if the issue be balanced in doubt.

The conditions upon which the decisions turned and the

language of the court itself show that the cases were considered as exceptional, and that it was with regret that the court felt itself forced to reject the construction of a State law placed upon it by the State court, and it is not to be believed that it was intended to establish, as some of the circuit courts seem to think, a general rule to the effect that if the exact question involved in a transaction had not been determined prior to the transaction, the Federal courts are to exercise their untrammelled judgment in total disregard of a well settled course of State decisions rendered in other cases setting at rest the identical question in issue.

Pretermitting the constitutional reservation of the States, and reasons of comity, there are other cogent reasons why such could not have been the intention of this court. Such rule would be (1) repugnant to the fundamental maxim of *stare decisis, et non quieta movere*, as recognized for centuries; (2) to impeach the ability of the State judges to perform the particular functions of their office; (3) opposed to the overwhelming weight of decisions of this court covering the entire period of its existence; (4) unwarranted by the reason and spirit of the exceptions themselves upon which the supposed rule is predicated.

The definition of the maxim sustains our first proposition unless it can be demonstrated clearly that the decisions of the State court are radically wrong in principle. The presumption is that the State court is peculiarly familiar with the local law, and best qualified to interpret it. (Elmendorf *vs.* Taylor, 10 Wheat. 159), and to be overcome the demonstration should be axiomatic. With regard to the second proposition, the establishment of such a rule would be to raise the presumption that State courts habitually construe the local laws erroneously and, therefore, that before their decisions can be admitted to have binding effect, contracting parties must have notice of what are likely to be alterations and not proper constructions of the law. The reverse is true and, ordinarily, parties are presumed to know the

law and are bound thereby, and a proper construction is not a change in law—it relates back to date of enactment. The third proposition is sustained by the references already given. Other decisions could be cited, if necessary. The fourth proposition is sustained by an analysis of the condition in each case which caused the departure from the general rule.

The exceptions to a general rule do not make a new general rule. The effect of each exception must be fastened to its own cause, and before a circuit court would be justified in ignoring a long line of settled decisions of a State court there should be a condition at least somewhat analogous to some one of the conditions which exist in the many cases in which this court felt constrained to reject the conclusions of the State courts. We believe that this court has not in any case, where the conditions were analogous to those in the case at bar, departed from the general rule, and the very conditions which existed in the exceptional cases and the reasons for departure will preclude this court from refusing to follow the construction of the State court of the law involved in the case at bar. For instance, in Gelpcke *vs.* Dubuque, and similar cases, a settled series of State court decisions were followed in preference to a later conflicting decision. For stronger reasons, this court will follow the chain of decisions of the Georgia court, not only that they are the latest, but also that they are not in conflict with any decision of the court. In view of Burgess *vs.* Seligman, and similar cases, the court will logically follow the Georgia lead because the conditions are exactly reversed, since it was conceded by the court below that on the question in the case at bar the State court had adopted the settled construction eleven years before the Federal court rendered any decision thereon. Besides, in the case at bar there is a settled series to follow, while in Burgess *vs.* Seligman there was only one case with the State court decision adverse.

We therefore say that the very reasons for departure from

the general rule show that the settled construction of the Georgia court should govern, and that the circuit court was unwarranted in disconnecting from a certain condition a short conclusion which was based upon the particular condition, and apply it to the case at bar, where there is no such basis for a similar predication.

Though constrained in many cases by exasperating conditions to reject the conclusions of State courts, in making such exceptions to the rule this court has always expressed its determination to avoid, if possible, any unseemly conflict with well-settled decisions of the State courts, and to agree with the view of the State court if the question is balanced in doubt (see Freeport Water *vs.* Freeport, 180 U. S. 597, referring to Burgess *vs* Seligman, *supra*). In the case at bar we say that from the very nature of the issue and the fact that it was decided in the same way in several cases during such a long period raises an impregnable presumption of correctness, or the conditions are at least sufficient to balance the question in doubt in the mind of this court.

The other cases decided by this court, cited by the court below, are easily distinguished from the case at bar. In Shelby County *vs.* Bank, 161 U. S. 149, the decisions of the Supreme Court of the State on the question at issue were conflicting and unsettled, as they were in Gelpcke *vs.* Dubuque, *supra*. In L. & N. *vs.* Palmes, 109 U. S. 244, the decision of the Supreme Court of a State was directly under review and the question to be decided was whether the effect given a law which, in violation of the constitution, impaired the obligation of a contract. The same may be said of Vicksburg *vs.* Dennis, 116, U. S. 665, and of Mobile *vs.* Ohio, 153 U. S. 486. It seems clear that none of these cases can be cited with propriety as a precedent for the action of the court below.

We say, as held by the Supreme Court of Georgia, that the constitution manifested a plain purpose to prevent an accumulation of liabilities upon municipal corporations,

and that it contemplated yearly contracts for the expenses of each year, and annual settlements of all liabilities incurred without popular sanction. To say that it had in view only bond issues and unconditional liquidated promises, is to construe the purpose and intent out of the constitutional inhibition. Such construction must be avoided. Lake *vs.* Rollins, 130 U. S. 666, 672. If an agreement by a city to pay upon the performance of a condition was not within the purpose of the prohibition, then, as well said by the Supreme Court, the framers of the constitution did "only a vain and idle thing" in placing the clause in the fundamental law, since it merely has the effect of unreasonably restricting the manner of incurring, and not the incurrence of liabilities. If the city could make a twenty-year contract for water, only severable by breach on the part of one or the other of the parties, what is there to prevent it from incurring every manner of liability? It could, within supposed limitations, by agreeing to pay upon performance, erect buildings, build railroads, make donations, and engage in all kinds of enterprises for the supposed welfare of the inhabitants, without their consent, and over their protest.

The ultimate finding of the court below on the question of debt is not entitled to consideration. It found that the contract did not incur a prohibited debt, but in a subsequent, ultimate conclusion it found in effect that it did incur such debt, and therefore the conflict in findings sets them at large. We will refer more particularly to the antagonistic findings under "recovery," *infra*, mentioning here the fact that the Master finds a debt for water rent for the year 1911, recommends a judgment therefor and a decree for specific performance of payment.

Revocation.

The court below found, among other things (Master's General Concl., No. 5, pr. rec. 113), that the franchise of the water company could not be revoked by the city in its own

interest. There is not a scintilla of evidence of record to show that the city ever attempted to revoke such franchise, nor was any such issue raised by the pleadings. The finding of the court was gratuitous and foreign to the issues, and we will not be expected to more than call attention to that fact.

Recovery Contrary to Law and Evidence.

The court below found (Master's Concl. of Law, No. 2, subd. 3) that the contract between the city and the water company did not create a debt within the meaning of the State constitution. This ultimate conclusion was predicated as follows (pr. rec. 104):

> "If the water company should fail to perform the service, the city would be under no obligation to pay. In no event was it liable to pay any instalment until the service for which the payment was due had been rendered."

As to the facts the court found (Master's Findings of Fact, No. 9, pr. rec. 91) that at times the company's reservoir leaked; that sufficient pressure was not constantly maintained, and (finding No. 8, pr. rec. 90) that the water supply was not protected from surface drainage from residences and from slaughter-pen offal, and that only at certain seasons of the year was the water safe, while at other seasons it was muddy and contaminated by said drainage. It also found informally (Master's Concl. of Law, No. 2, subd. 5, pr. rec. 107) that the company had not complied with the requirements as to pressure, yet its ultimate conclusion was that the city could not "invoke a forfeiture, nor can it plead the facts as a defense to the right of the complainant to relief." There is no relative consistency between all these conclusions. In one the court finds that no debt was created, because there was no liability to pay until performance. In another, that the water company did not perform its contract, and yet its ultimate conclusion was that the

city was unconditionally bound to pay and was not entitled to plead failure of performance. These antagonistic conclusions of law can not both be correct, and if either is wrong the complainant has no case. If there was no debt incurred, for the reason stated, then the complainant is not entitled to recover, because the water company failed to earn the instalments. If the obligation was such that it could not be broken by failure to perform, then the reasonings of the court as to the debt are set at naught, for the debt was, in such case, inevitably one prohibited by the State constitution.

We say that before the complainant can recover it must appear (1) that the city had the power to make the contract; (2) that it did make it; and (3) that the water company performed. Commissioners *vs.* Platt, 79 Fed. 571. If the contract was illegal complainant can not recover. Gibbs *vs.* Gas, 130 U. S. 396; Central Transp. Co. *vs.* Pullman, 139 id. 24; Oliver *vs.* Gilmore, 52 Fed. 565; Cedar Rapids Water *vs.* Cedar Rapids, 9 Mun. Corp. Cas. 101; Burrill *vs.* Boston, 2 Cliff. 590; Law *vs.* People, 87 Ill. 385; Griswold *vs.* East St. Louis, 47 Ill. App. 482; Wallace *vs.* San Jose, 29 Cal. 187; Bishop *vs.* Palmer, 146 Mass. 474; Arnot *vs.* Pittston, 68 N. Y. 558. Assuming *arguendo* that the string will be found to bind the city to the contract, still it was incumbent upon complainant to prove substantial performance by the water company of the contract both as to pressure and as to quantity and quality of the water supplied. Winfield Water *vs.* Winfield, 51 Ks. 104; Farmers' L. & T. Co. *vs.* Galesburg, 133 U. S. 156; Walla Walla *vs.* Walla Walla, 172 U. S. 1; St. Cloud *vs.* Water, 9 Mun. Corp. Cas. 473; Boyes *vs.* Green Mountain, 3 Colo. App. 295.

It is necessary to find what the contract was before it can be ascertained whether it has been performed. This court will doubtless construe the contract in accordance with its declared object. The principal object was to supply water for "domestic, sanitary, and other useful purposes," the users

of the water to pay such rentals as prescribed or agreed upon. The incidental object was fire protection, and the city promised to pay a stipulated price for license to use the water in fire emergencies. The city gave the water company permission to use the public streets for the purpose of distributing water to consumers. In consideration of the permission and of the stipulated rentals agreed to be paid, the water company agreed to construct and maintain a *complete and thorough system of waterworks* for the purposes described, and to erect and maintain a reservoir of sufficient height to produce such pressure on the mains that *from any hydrant on the principal streets* a stream of water would be projected fifty feet in still air through one hundred feet of hose and one-inch nozzle.

The corollary of the principal object of the contract is that the water company obligated itself to furnish water reasonably *suitable* for the purposes intended. It was necessarily implied that "a complete and thorough system of waterworks" for the declared purposes would supply such water. Yet the court found (Master's Concl. of Law, No. 2, subd. 5, pr. rec. 107):

> "The quality of the water is the same as it was during the years the city accepted it as satisfactory. The water shed and its condition was substantially the same then as now. There is no requirement in the contract that the water should be other than that furnished in its natural state from the source of supply designated by the city. It was not required that the water should be filtered, or otherwise rendered more fit for domestic use."

We say that it appears that the court throughout the hearing of the cause labored under the delusion that the waterworks were built for the city; that the city issued its bonds to pay for them, and upon acceptance of the system as stated, was thereby estopped from pleading any failure. The city was not the purchaser of these waterworks, and the

result of *caveat emptor* does not apply. When the city accepted the system, as stated, conditions were favorable and the water sample satisfactory. Acceptance in such case has never been and will not be construed as an estoppel, since the obligation to furnish a proper supply of water was a continuing one, and the acceptance upon which so much stress has been laid was simply to determine the time when the water rents were to begin, and all of this has been settled. Farmers' L. & T. *vs.* Galesburg, 133 U. S. 156.

In that case the court said (p. 170):

> "Whether or not the water company was able to furnish the required quantity of water every twenty-four hours, and whether or not its quality as to purity and goodness for domestic and other uses was in compliance with the ordinance, must rest upon the facts as proved to exist. Moreover the estoppel, so far as it did exist, was not a continuing one. The obligation of the water company to furnish the quantity and quality of water required by the contract was a continuing obligation. . . . There was not and could not be a final and absolute acceptance of the waterworks by the city, without regard to a future compliance on the part of the water company with the requirements of the contract. The case was not one of works constructed for the city, and to become its property upon acceptance; and the acceptance related merely to the sufficiency of the structures for fire service at the time."

It has also been held that the duty to furnish water of proper quantity and quality is a continuing one, and the city is not estopped by the fact that it accepted water during a number of years. St. Cloud *vs.* Water, 9 Mun. Corp. Cas. 473.

The finding that the condition of the water had not changed is wholly at variance with the evidence (see brief of testimony, under specification 64, and also of J. P. Allen, engineer of waterworks, under 66). It was shown that the scaffold and slaughter pen were established and maintained

after the selection of the source of supply; that the water was contaminated by drainage from offal from the slaughter pen, and from surface closets, which were beyond the jurisdiction of the city, and that, after full notice of the causes of the contamination, the water company failed to protect the water. Physicians testified that the water was unfit for drinking purposes. One tested it for a year by letting a pitcher full stand over night. The water was nearly always offensive in the mornings. It putrified during the night, a result not obtained with good water. When the old tank was torn down (since the filing of the bill), the bottom was covered with foul, muddy sediment four inches deep. On one occasion, within fifty yards of the mouth of the water pipe, a dead horse was found in the stream, in the last stages of decay. This was outside of the city limits. The water tank became a perch for buzzards, and several of them were found drowned in the tank. Citizens would not use the water for drinking purposes, and the supply, such as it was, was not always sufficient for irrigating and was at times cut off. For more than five years the public school had refused to use the water, and had to have other water hauled until an artesian well could be established. From undisputed evidence it was established that the water furnished to the citizens of the municipality for domestic and other useful purposes was filthy, stinking, and so offensive as often not to be fit even for washing or bathing purposes, and at times it could only be used for sprinkling lawns and gardens, and that the supply for this purpose was uncertain.

It is submitted that the obligation of the water company was not simply to have, at a particular time and under favorable conditions, water suitable for the purposes of the contract, so as to successfully stand a test, but it was its imperative duty to furnish habitually water suitable for the required purposes, and that it failed to perform its obligation by permitting the water to become so contami-

nated as to be unfit for use, and when unfit in its natural state, it was its duty, under the contract, to cleanse and purify it in some way before supplying it to the citizens who were paying therefor. The court's application of the doctrine of estoppel would have the effect of putting every such city in the power of its water company, as the latter could by simulated compliance with its contract reap the benefits due only to substantial performance. By such doctrine, the inhabitants would not only be deprived of such water as they are entitled to demand, but such performance as that of the company would be a constant menace to the health of the inhabitants and the safety of their property.

In finding the incidental object of the contract, the court will presume notice to the parties of matters of common knowledge, one of which is that fires occur without warning, and another that water pressure in a horizontal main is lowest where the friction is greatest. A pressure that will throw water only fifty feet high is very low for efficient service, but as the contract required such minimum pressure at *any* hydrant, it necessarily meant at the hydrant where the pressure was lowest, and contemplated a higher pressure wherever the friction was less. As fires occur without notice the very essence of the agreement was that the required pressure should be constantly maintained. Our construction of the contract is so obviously within the expressed intention of the parties that we would not advance such plain propositions were it not that the decree of the court below was fabricated upon views of the contract wholly opposed.

The conclusions of the court below were based upon the theory that the water system was constructed in accordance with specifications, and having been accepted, the city could only prove failure of performance by evidence that the tank was not kept filled, or from leaking, or that otherwise it would be necessary for the officers of the company to be notified of any test to be made so that the tank could be

filled and the system otherwise prepared to produce a *maximum* pressure under favorable conditions. To illustrate, a day or so after the water system had failed to prevent the burning of three houses in 1897 (see brief of testimony of A. J. Baldwin, specification 66), the superintendent of the waterworks, Mr. Horsley, gave notice that he would make a pressure test. He was furnished with one hundred feet of new hose and one-inch nozzle, and the test was made on the same plug which had been used to throw water on the fire. Notwithstanding the hydrant was turned on in full, the water failed to go higher than thirty feet, which was twenty feet below the minimum pressure required at any hydrant. The air was still and there was no dispute that the waterworks were at the time in about the same condition as they were in during 1894. With regard to this test, the court found (Master's Findings of Fact, No. 9, pr. rec. 92)—

> "the water failed to reach a height of fifty feet vertically. It was shown that this test was a voluntary act of the local superintendent, without notice to the officers and owners of the waterworks company or to the city."

Though not of consequence, it will be noticed that the court did not state the height the water was actually thrown as shown by the evidence.

This finding goes to sustain our charge that the court misconstrued the contract and misconceived the issues made by the law and pleadings. The court found that the pressure had not been constantly maintained and it is obvious from its point of view that the water company was only obligated to maintain a system which would after preparation and under favorable conditions produce a *maximum* pressure to throw the water the required height. The city has not claimed that it was not within the possibility of the system to produce such pressure under such conditions. The city insisted that under the contract it was the duty of the water company to maintain habitually the *minimum*

pressure at any hydrant, and that it was a violation of the contract for the pressure to be found wanting when the fires occurred.

Superintendent Horsley, witness for complainant, testified (see brief of testimony, specification 57) that in 1899 and 1900, during the driest season, on several occasions there was not sufficient pressure to force the water out of the hydrants. In connection with this fact, established by the admission of the superintendent of the company, and that established by the actual test made, the city offered to prove by what happened at the various fires which occurred during the period for which rentals were claimed that the waterworks as constructed and operated did not come up to the requirements as to pressure.

The testimony offered (see brief of testimony under specification 21) was in corroboration of and to supplement other testimony, and tended to show by the numerous named witnesses that the pressure was signally inadequate at any of the fires which occurred during the period for which rents were claimed to prevent destruction by fires. In some cases the pressure was only sufficient to force water to run out of the nozzle, and in such cases, where the heat would permit to be of any service, the water had to be poured upon the fire from above. On other occasions, and even with smaller nozzle than prescribed in the contract, the water could not be thrown more than twenty-five feet. At one fire the pressure was so weak that the roof of a one-story building could not be reached without taking the nozzle to the top of the veranda. At another, within four hundred feet of the pumping station of the water company, the pressure was not sufficient to throw water to the top of a veranda twelve feet high. At none of the fires could water be thrown more than thirty feet.

The primary consideration of the city's agreement to pay was for the protection to be afforded against fires, and the constant presence of the pressure required was essential to

such protection, and it is insisted that this evidence of the actual results of the very service the company had engaged to perform was preeminently relevant and that this was one of the few ways in which the city could establish the absence of required pressure at critical times, and the consequent failure of the company to earn the rentals claimed. No form of test was prescribed by the contract, and it must be plain that any test made by the company after due notice, as contemplated by the court below, would have no bearing on the question as to whether the required pressure was present at all times, since the company would naturally make preparations for a test which could not be accepted as proof of the continuous existence of required pressure. Yet the court, consistent with its theory of the contract, rejected all this testimony, holding that it was irrelevant. A brief of the court's reasons for rejection is contained in specification 21.

The testimony supplements and corroborates other evidence, and shows that the company did not operate the waterworks as required by the contract. If the company's failure to perform its obligation was not otherwise established the case should be reopened for this and other testimony of like character.

The court found (Findings of Fact, No. 9, pr. rec. 92) that—

> "Excepting on rare occasions the reservoir was kept supplied with water sufficient to produce the required pressure."

It is charged that this finding contradicts the evidence (see brief of testimony under specification 36). At one fire, a hydrant was turned on and it took half a minute for the solid, soft mud to be forced out before the water would run. One of the witnesses testified as to the actual test made in 1897, in which the water was not thrown more than thirty feet in still air. Another witness testified that the old tank, before it was torn down, leaked so badly for several years

that it was never filled entirely; that it was usually kept from two-thirds to three-fourths full. Another, that since 1899, he noticed there was no pressure on one occasion. Another witness testified that the tank was empty twice from 1896 to 1899, and that the tank was leaking all the time; that the leak amounted to a considerable stream which interfered with passage on the sidewalk. Another testified that at a fire in June, 1898, on a fair day, with only twenty feet of hose, the water would not reach the roof of a house twenty-five feet high. Another, the engineer of the water company, admitted that the water was muddy and unfit for drinking, and that there was not enough of it to fill the tank, which was very leaky; that sometimes he kept the pumps going night and day, but could not keep the tank full because it leaked so badly. The superintendent of the waterworks admitted that there was no pressure on several occasions during 1899 and 1900, during the dry season.

The court found (Findings of Fact, No. 9, pr. rec. 92) that—

> "No complaint concerning the character of service or amount of pressure was made to the water company until after the institution of the present suit."

This finding contradicts the admission by the superintendent of the waterworks, witness for complainant (see specification No. 58), that complaints were made to him that the water was muddy and unfit for use and smelled badly and that the pressure was insufficient, and that he was asked at times to flush the mains so that the water would clear, the complaints beginning in 1897. This superintendent was between the people and the water company, and he was the one to whom complaint should be made, and his admission brought home to the company full notice and knowledge of the conditions and established ultimate and controlling facts.

The court found (Findings of Fact, No. 6, pr. rec. 90), that no other means for fire protection was afforded by the

city, so that it must have been known that the water of the company would be used at fires, and that the city did not forbid the use of the water by its fire department; that the city continued to enjoy the fire protection after the repudiation of the contract as it did before. The evidence shows to the contrary, that the city had the same means of fire protection it had before the waterworks were constructed, viz: fire engines and an independent supply of water in the city cisterns; that it did forbid the use of the water by the fire department; that it abandoned the waterworks system and so notified the company (see brief of evidence under specification 62).

It is true that the citizens generally, including some volunteer firemen and city officials, did, at fires, use the water of the company, but these persons were all acting, as shown by the evidence, in their individual capacity, and in such emergencies, especially at village fires where the general public takes charge of the fight, it was only natural that these volunteers would seize upon any means at hand to prevent the spread of destruction. The good faith of the city in repudiating the contract should not be impeached because, under the stress of emergency, these citizens laid hold of the company's mains for such protection as might be secured therefrom. The city has been under injunction since September, 1899, not to use water from any system other than that of the water company, and at least since that date neither the circuit court nor the complainant can be heard to charge lack of good faith because, on several occasions attempts were made to use the water of the company.

The complainant made no serious effort to prove such performance by the water company as would entitle it to recover; by its own witnesses the contrary was established. It has rested its case upon an odious estoppel and proposes to fasten the *main contract* upon the people of Dawson through the mere agreement by the city to pay water rentals

for specified protection which has never been furnished. Besides, surely it will not be seriously contended that protection against two or three fires, which were likely to occur annually, was the motive of the *contract, and that the inducement* to the erection of the works was the agreement to pay for the license to take water in such emergencies. The court found (Findings of Fact, 15, pr. rec. 93) that the revenues of the company exclusive of the rentals claimed from the city had been insufficient to pay expenses and fixed charges. The relevancy of this finding eludes us, but it suggests an inquiry. No one can deny that the license instalments to be paid by the city was a mere incident to the main undertaking which was to sell water to private consumers. If the principal undertaking was not profitable, why not? The answer is to be drawn from the evidence. The water was not potable. At times the supply was insufficient and often the water was so offensive as to be unfit for anything but irrigation. Under such conditions there could be but few purchasers. The company was not only guilty of a reckless disregard of moral ethics, but also of business enterprise, and it justly suffered from the result of its own wrongs.

The doctrine of estoppel as preached in this case is such as should not be tolerated. It should not be lost sight of that during all these years the city has unnecessarily suffered loss of property and impairment of health and has been deprived of the comfort of a proper supply of water. The revenues incident to the main undertaking have not been impaired except by the gross improvidence and negligence of the water company, and we challenge reference to any decision of this court favoring estoppel against a city under such circumstances as are in evidence. The court below cited Pikes Peak Power *vs.* Colorado Springs, 105 Fed. 1, and Walla Walla *vs.* Walla Walla Water, 172 U. S. 1, as sustaining such an estoppel. In the first case, the contractor agreed in 1895 to construct a tunnel for the city for $90,000

to be completed by 1897. The time was subsequently extended until September 27, 1898. The contractor had miscalculated as to both time and cost. At the end of the extension the tunnel had cost him more than twice the sum the city had agreed to pay, and $100,000 was still needed to complete the tunnel. The contractor had expended all his means and was unable to proceed without borrowing. Under the circumstances, the city made a new contract with him in September, 1898, granting him by ordinance the use of the water system of the city to produce power to generate electricity and the right to establish conduits and string wires on the streets during a term of 25 years. The contractor agreed to complete the tunnel on or before December, 1899. On the strength of this contract he borrowed money and proceeded with the construction of the tunnel. On February 23, 1899, the city repealed the contract ordinance. The contractor prosecuted his work vigorously and in good faith, and drove the tunnel through the mountain within the time agreed upon, but before the time expired he had not been able to put the finishing touches to the grade in accordance with the letter of the specification. There was, however, an express provision in the contract that if the work was delayed for any cause for which the city was responsible the time for the completion of the work should be extended in proportion to the delay. The city had been responsible for some delay. The city contended that the contract was invalid and insisted that the contractor had forfeited his rights and privileges because he had failed to finish the tunnel within the time limit. The court found that the contract was valid under the laws of Colorado and that the great burden of the work of driving an immense tunnel had been borne and the tunnel substantially completed within the time limit; that the substantial benefits of the contract and the consideration which induced the city to make it had accrued, and that the contractor could not be deprived of his rights upon such a bare technicality. No moving principle can be found

in the case which can be applied to the one at bar. The most striking difference is that in that case there had been substantial performance by the contractor before the expiration of a time limit, while in the one at bar the performance of a continuous contract has been simulated and perfunctory. The city has not reaped any substantial benefit such as the municipality had in the Pikes Peak case. No other just conclusion can be drawn from the evidence than that the performance by the water company has not only been of no practical benefit, but has constituted a menace to the health of the people and the safety of their property, and that the contract has constantly prevented the city from performing its duty to the public. With reference to the Walla Walla case, it is only deemed necessary to say that city was not allowed to set up facts, because in the contract made by it in pursuance of legislative authority, the city made a provision for avoidance and expressly agreed upon the method by which it was to be accomplished. It was not estopped by the preliminary acceptance, made to mark the beginning of the rental period.

Specific Performance.

Ordinarily a city can not alienate its jurisdiction over the streets or its power to serve the public, and before the complainant could be heard to say in a court of equity that the city had violated its contract rights, it was necessary for it to show that there was a valid contract, fair and reasonable in all its parts, which had been performed by the water company in so far as permitted. Logansport *vs.* Logansport, 114 Fed. 688; Home Land *vs.* McNamara, 111 id. 822; Wabash *vs.* Defiance, 167 U. S. 100; Richardson *vs.* Buhl, 77 Mich. 632; Gibbs *vs.* Gas, 130 U. S. 396; Story Eq. Jurisp. 750, 776.

If the agreement by the city to pay rentals is valid, but there is no exclusive franchise, the bill should have been

dismissed, because the remedy was at law. Raton Water *vs* Raton, 174 U. S. 360. It is apparent from the bill that the court could not have entertained equitable jurisdiction except upon the finding that the grant of the franchise and the promise to pay water rentals implied an agreement by the city not to erect waterworks of its own. It is so well settled that equity would not otherwise grant relief, that we must assume for the sake of argument that the company acquired such a franchise, and also that the contract to pay rentals was valid under the laws of Georgia. Notwithstanding the assumption, we maintain that this is not a case in which specific performance should be decreed.

1. A third party such as complainant, with no duties to perform, can not invoke the remedy of specific performance to require the city and the water company to perform the contract between them. The complainant was not in such contractual relation with the city as to be entitled to the relief asked. We have shown under "Privity" that no liability could have attached to the city in favor of complainant except upon foreclosure, or, at least assertion of its right to collect the rentals. The city did not issue any negotiable promises to pay. The case of Fidelity Trust *vs.* Fowler Water, 113 Fed. 560, cited by the court below (Master's Conclusions of Law, No. 2, subd. 8, pr. rec. 110), does not parallel complainant's case. In said case the water company *erected the waterworks for the town*, and in the contract between the parties the trustee of the bonds was made direct payee of the rentals, and when the bonds were issued there was endorsed on the back of each the provision of the ordinance to the effect that the rentals were to be paid direct to the trustee of the bonds, to be applied in satisfaction of the *principal and accruing interest.* Soon after the works were completed they became the property of the town and the first four instalments of the rentals were paid to the trustee and not to the water company. Direct contract relations were established between the town and the trustee, and the

city secured the benefit (the waterworks) of the proceeds of the negotiable bonds.

2. Specific performance will not be decreed against one in favor of another who has been derelict in the performance of his engagement, and a complainant must not only aver but actually prove performance. Marble *vs.* Ripley, 10 Wall. 339; U. S. *vs.* Noe, 23 How. 315; Ohio *vs.* Washburn, 26 Fed. 702; Columbia *vs.* Hagner, 1 Pet. 455. The complainant has not only failed to prove performance by the water company, but the testimony of its own witnesses showed that there had not been performance. We have referred particularly to the details of the evidence under "Recovery," *supra*. We have shown under "Privity" that the complainant could have no other and better rights than those of the water company.

3. It is never decreed as a matter of right, and will not be decreed unless equity and justice can thereby be done both parties to perform. McCabe *vs.* Matthews, 155 U. S. 550; Willard *vs.* Tayloe, 8 Wall. 557; Kirkland *vs.* Downing, 106 Ga. 530. Such decree in this case would not only permit the water company to extort money from the city, but would deprive its inhabitants of the power during a long period to secure water from any other source, thereby forcing them to accept and use such water as the company has supplied and will doubtless continue to furnish.

4. It will not be decreed unless it appears that the mutual performance can be secured thereby. Both parties must be able to perform. Leicester *vs.* Front Royal, 55 Fed. 190; Purcell *vs.* Miner, 4 Wall. 513; Morgan *vs.* Morgan, 2 Wheat. 290; Lipscomb *vs.* Watrous, 3 D. C. App. 1; Pomeroy Contr. 162 et seq.; King *vs.* Hamilton, 4 Pet. 328; Story Eq. Jurisp. 750, 776; Smith Eq. 220. The final conclusions of the court below (Master's Concl. Law. No. 2, subd. 8). shows that this principle has been directly violated. It reads as follows (pr. rec. 112):

"Should the water company fail or refuse to comply with its obligations under the contract, the complainant would have an action for damages for such breach; but it appears that the water company *owns no property other than that covered by the mortgage to the trustee; so that a suit for damages against it would not measure up to the standard of an adequate legal remedy* (italics ours).

"Hence, I conclude that the complainant is entitled to a decree against both the city and the water company, requiring them and each of them to specifically perform the contract between them."

It will be seen that the court below decreed specific performance for the main reason that a suit for damages against the water company complainant could not attain adequate relief. Then, without requiring of complainant any guarantee of performance by the water company, the court advisedly requires the city who is able to perform, and the water company who is not able, being practically insolvent and judgment proof, as shown in the bill, the evidence, and in the informal findings of the court, to perform the contract between them. The finding of the court shows that it anticipated failure by the water company to perform its part of the contract, and yet, in order to protect claimant, it requires the city to pay the rentals notwithstanding. The court evidently proceeded upon the theory that the city had itself issued negotiable bonds. The decree in effect grants relief to complainant and the water company, but leaves the city remediless as against either, the water company being without ability to perform, or pay the penalty for nonperformance. The only liability which can be forced by the court is placed upon the city, and we say that the decree, under the circumstances known to exist, is not only wholly inadequate but is repugnant to every principle of justice and equity (Farmers' L. & T. Co. *vs.* Galesburg, 133 U. S. 156). In this case the court said:

"The danger to the life and health of the inhabitants of the city from impure water, and the continued exposure of the property of the city to destruction by fire from an inadequate supply of water, were questions peculiarly under the care of the municipality."

The bondholders are not the only innocent people involved in this transaction. The inhabitants of Dawson have no contractual relations with the city corporation. They are as innocent as the bondholders, but in the light of their vital interests in the result of the action of the court, the rights of the bondholders dwindle into absolute insignificance. For years, without their consent, they have either been deprived of water or compelled to accept the foul substitute furnished by the water company, and at all times their property has been without adequate protection from fires. It is palpable that the main object of this suit is not to collect the incidental rentals payable for fire protection, but to saddle for years an iniquitous system upon the helpless people of this town, and to force them to take this water. We say that equity will not thus become the instrument of iniquity. King *vs.* Hamilton, 4 Pet. 328.

5. It will not be decreed unless the contract is capable of being enforced by one sweeping order. If the contract requires the keeping of continuous covenants, to be performed by the parties for several years to come, a court of equity will never undertake to supervise the performance of such a contract at the instance of any party (Berliner *vs.* Seaman, 110 Fed. 30; Oregonian *vs.* Oregon, 37 id. 733; Strang *vs.* Railroad, 41 C. C. A. 474; Marble *vs.* Ripley, 10 Wall. 358; Texas *vs.* Marshall, 136 U. S. 405; Ross *vs.* Railway, Fed. Cas. 12,080), and the remedy will be denied where action by the court would be required at different times and under different circumstances, and under conditions which would be next to impossible to anticipate. Strang *vs.* Richmond, 93 Fed. 71; Pullman *vs.* Texas, 11 id. 625; Cathcart *vs.*

Robinson, 5 Pet. 264; Anson *vs.* Townsend, 73 Cal. 415; Atlanta *vs.* Speer, 32 Ga. 550; South & North Ala. *vs.* Highland, 98 Ala. 400; Elec. Light *vs.* Mobile, 109 id. 195; Chadwick *vs.* Chadwick, 121 id. 580; Knott *vs.* Mfg. Co., 30 W. Va. 790. Before granting a decree for specific performance, a court should glance forward to assure itself of practical results. It would undertake nothing which it could not enforce with a reasonable degree of certainty of justice. In the case at bar, should not the court in the first place feel in duty bound to construe the contract so the parties would know what to expect in the performance? If the contract, as we claim, requires a constant minimum pressure that will throw water fifty feet high, would not the court direct the company to maintain such pressure? Should it so direct, would it not be the duty of the court to see that the pressure is maintained? If so, how is this duty to be performed? If the court provide no machinery of its own to enforce performance by the water company, and should the company fail to respond to the decree, how could the city in justice be required to pay the water rentals? If permission be given the city to file ancillary complaints for each failure of pressure, would not the court as well as the city be overburdened, judging the future by the evidence of the past? Should the court find the complaints well founded, how would it force the water company to keep its contract, especially since it appears in this case that it is practically insolvent and its system inadequate? If the contract requires suitable water, as we claim it does, for domestic purposes, how would the court know whether the company complies with its obligation in this regard? Of course the people could abstain from renting water, as some have done, but we feel sure that a decree would not contemplate depriving the inhabitants of a suitable water supply. How is this water supply to be tested and failure of performance by the water company proven? Would it depend upon ancillary suits by the city or by new

suits by consumers? This is a continuing contract, the proof of performance of which, both as to pressure and as to quantity and quality of water, will require tests made every twenty-four hours, and we may say a decree of performance in such case should foresee and anticipate such questions as must necessarily arise. If the decree can not be made sweeping enough to provide substantial justice to all parties, then the court was not justified in assuming supervision over the performance of the contract. In this regard it was said in Berliner *vs.* Seaman, 110 Fed. 34:

> "Were the court to assume supervision of this continuous contract now, and enforce its performance by its injunction, it must continue this supervision, and see to it during the whole existence of the contract that both parties fulfilled their mutual obligations. This has been repeatedly declared to be outside of the functions of a court of equity."

In Ross *vs.* Railway, Fed. Cas. 12,080, Mr. Justice Miller said:

> "At every step of its progress, the interposition of the court, either by orders in this case or by decrees in successive cases, may be invoked if we are at this time to lend aid of chancery to either of the parties. It is not difficult to foresee the mischief of such a course. The rule is settled, even in the English chancery, where the jurisdiction is greatly extended in all such cases, that it will decree specific performance only when it can dispose of the matter by an order capable of being enforced at once; that it will not decree a party to perform a continuous duty, extending over a number of years, but will leave the opposing party to his remedy at law."

Similar reasons for refusing decrees were given in Texas & P. R. Co. *vs.* Marshall, 136 U. S. 393; Marble *vs.* Ripley, 10 Wall. 358, and numerous other cases. In Marble *vs.* Ripley, while the contract was with reference to supplying marble, the objections raised by the court are obviously ap-

plicable to the circumstances which exist in the case at bar. The duties with reference to the marble were continuous. They involved skill, labor, and judgment. In case of decree, the court would be liable to be called on at all times to determine whether the proper quality and quanity of marble had been delivered, and whether every block was from the right place. The marble had to be delivered in certain kinds of blocks, and it was held that the court was incapable of determining whether they were in compliance with the contract and no decree could be framed which would end the controversy.

The cases cited by the court below to justify its decree are easily distinguished from the decisions cited by us. In those cases, the decrees were granted because they could be made "self-operating and self-executing." The only decree which could have such operation in the case at bar would grant relief to the complainant in disregard of justice to the city and its inhabitants.

It is obvious from our point of view, at least, that the decree granted by the court below violates most of the prerequisite equitable maxims as well as some of those descriptive and substantive.

"Salus Populi Suprema Lex."

Even were an exclusive franchise lawfully conferred the city did not part with its police power and its duty to protect the public health and safety. N. O. Gas *vs.* Louisiana, 115 U. S. 650; Louisville Gas *vs.* Citizens Gas, id. 683; Butchers *vs.* Crescent City, 111 id. 746; Stein *vs.* Bienville Water, 34 Fed. 145. Such duty is paramount. Chicago *vs.* Nebraska, 170 U. S. 57; N. Y. *vs.* Bristol, 151 id. 556; and there is nothing in the Federal Constitution which was intended to impair it. Barbier *vs.* Connolly, 113 U. S. 27; Beer *vs.* Massachusetts, 97 id. 33; Walla Walla *vs.* Walla Walla, 172 U. S. 14; and whatever is contrary to public policy, or inimical to public interests, is subject to police

power, which, if exercised *bona fide* for the protection of the public, is beyond the reach of judicial inquiry. L. & N. *vs.* Kentucky, 161 U. S. 677.

The record evidence in this case shows that the water was unwholesome and unsanitary for domestic purposes; the waterworks were weak and inadequate for fire protection. Instead of being a source of health and protection, the system is a constant menace to the best interests of the city and its people. Under such conditions as were shown to exist, it was not only its right, but the imperative duty of the city to secure a better supply of water, and this is what it was attempting to do when stopped by an injunction from the Federal court.

In this suit it can make no difference to the court that the city, in renouncing the contract, gave the then controlling reasons for its action, and that the unfitness and insufficiency of the water did not become manifest until after that. The paramount interests of the people are at stake, and this court is bound to take notice of the actual existing conditions. Their rights can not be limited by the agreement of the corporation to pay water rentals or by its declaration as to the cause of repudiation. The facts having been developed by the pleadings and evidence, this court is bound to take notice of them, and passing by all other reasons it could not, in view thereof, grant a decree of specific performance. It has been and is now the duty of the city to take summary action, looking to the protection of the people, and this court will not permit the court below to destroy by injunction the police power which belongs to the municipality.

SUMMARY.

There Was No Jurisdiction.

Under the bill as originally filed the court had no jurisdiction. Diversity of citizenship alone was relied upon for jurisdiction, and this diversity did not exist, as the waterworks company was created and existed in Georgia only and was of legal necessity a plaintiff, though sought to be made co-defendant.

To save the bill from dismissal the complainant amended, seeking to introduce a Federal question, namely, that of the impairment of the obligation to pay for water under the alleged contract and of the alleged grant of an exclusive franchise to the waterworks company.

The renunciation of the alleged contract for the payment for water amounted only to a denial of liability and formal notice of such denial. It was no proceeding on the part of the municipality as a legislative agency of the State under any legislative act of the State.

As the city had no express grant of power from the legislature to grant an exclusive franchise, and as the legislature itself was expressly inhibited by the constitution from granting such a franchise, it is too plain for argument that no such franchise existed or could exist, and the claim of such franchise was mere pretense and no foundation for jurisdiction. If the city could not expressly and directly grant an exclusive franchise, neither the Master nor the chancellor had the power to imply that the city had made such a grant indirectly by agreeing to buy water of the company for the period of twenty years. In such case the court would be simply making for the city a binding contract that violated the constitution of the State.

There Was No Equitable Jurisdiction.

If the city was really bound by the water contract, it acted in violation of, instead of under, State law in renounc-

ing the same, and remained bound under such law to pay, notwithstanding such renunciation.

In the absence of an exclusive franchise, the city had the right to construct and maintain waterworks of its own, notwithstanding the calamities apprehended to the business and property of the waterworks company which might ensue, the case being a clear one of *damnum absque injuria.*

The question of exclusive franchise being eliminated, the complainant's remedies were plainly legal, if it had any rights.

But complainant really had no rights at all, as not a cent was due it on principal or interest.

There was not only no diversity of citizenship, no federal question, no ground of equitable jurisdiction, but so far as complainant was concerned, there was no subject-matter of jurisdiction, the complainant at best being but an assignee of alleged past due rentals, without other consideration than the undertaking on its part to sue in the Federal court on the same alleged contract which had been adjudged void by the Supreme Court of Georgia in the suit of the assignor, the waterworks company, against the same defendant, the city. There was no right of action in complainant in the circuit court.

Res Judicata.

The decision of the Supreme Court of Georgia in the case of the Dawson Waterworks Company *vs.* Dawson, 106 Ga. 696, is conclusive against the complainant on the question of the validity of the alleged contract and the right of the city to plead its invalidity.

Up to the time of its rendition, the Waterworks Company alone had collected the rentals or asserted the right to do so. That company alone had sued for such rentals and asserted any dominion over the contract. Until that company had selected the trustee as payee of rentals under the original contract, or had made some lawful assignment of such

rentals, that company alone had the right to sue or to otherwise raise the question of its validity.

Before the selection of a trustee and before the assignment to complainant, the decision of the Supreme Court of Georgia at the suit of the Waterworks Company had been rendered. Not only the subsequent assignee, but everyone having any interest in the rights of the Waterworks Company under that contract was concluded by that decision That contract in a suit upon the same by the original and highest and fullest owner thereof, and at the time the sole representative and possessor of the same, had thus been judicially condemned.

As alternative payee the trustee was a secondary payee, and as assignee was a subsequent assignee, and such trustee can not, either as secondary payee or subsequent assignee, or both, deny this condemnation.

There Was No Valid Contract.

Under the constitution of Georgia, as construed at the time of and since the date of the alleged contract, the same was void. This plainly appears from the decision in the Waterworks Company *vs.* Dawson, 106 Ga. 696, which not only adjudges this particular contract to be void, but holds and shows that the same was void under the constitution of the State as previously and with practical unanimity construed by that court since the adoption of the constitution and from dates prior to that of the alleged contract.

There Should Have Been No Recovery of Rentals.

Assuming that the contract for rentals was valid, and all grounds of equitable jurisdiction disappearing, the right of complainant to recover the rentals that were due was at law on sufficient proof of performance by the waterworks company of its contract as to required pressure and quality. There was no such proof for any one year or other definite period. In the original bill, the complainant had alleged

such performance as prerequisite to recovery. The Master not only does not hold that such performance had been proven, but in effect, though not formally, holds the contrary, both as to pressure and quality, and recommends recovery on the ground that proof of such performance after acceptance of the system by the city was unnecessary, and that the city had no right to plead non-performance, although in his argument to prove that the alleged contract attempted to create no debt as contemplated by the constitution, he says in effect that there could be no debt until performance. He goes to the extent of recommending recovery and decree for specific performance now for the rentals due and not due, including the year 1911, and the court decrees accordingly.

There Should Have Been No Decree for Specific Performance.

If there were any right to collect rentals, the plain remedy was by suit at law as they accrued. The requirement that the city use the water was unnecessary, because if the contract is valid and the waterworks company is able to perform and tenders performance, the right to recover is just as complete as in case of performance.

As to future rentals, the court simply had no power to decree in advance that the company and the city should perform at the instance of the complainant, the one to furnish the required quality and quantity of water and the other to make the future semi-annual payments. The decree for specific performance in this particular is wholly inconsistent with complainant's positions, as follows:

That the company had already performed, was performing, and intended to continue to perform.

That there was no debt on the city until performance and therefore no debt attempted to be incurred in violation of the State constitution.

If we are to interpret the decree as requiring payments

of future rentals without performance on the part of the company in accordance with the view of the master, it is still more unjust and inconsistent.

It adjudges complete indebtedness now for future rentals, thus holding that the twenty year contract created instantly two annual indebtednesses for every year for twenty years, after holding that contract valid because it did not create any debt.

There Should Have Been No Injunction.

The proof showed pressure insufficient and water unsuitable; that destructive fires were in consequence frequently occurring practically unhindered; that the water was at times muddy, filthy, and too offensive for domestic use. Should it be necessary to consider the merits of the case, the appellant urges the court to a full consideration of the evidence. The city, on account of the health of the people, and in order to secure protection from fires, was simply forced to secure waterworks of its own, and it was in the performance of a plain duty, proceeding lawfully to do so, when enjoined not only in said proceeding, but from making any other possible arrangement for securing water for the most necessary purposes and restricted to the alleged contract with the waterworks company, in plain violation of the appellant's rights and in utter disregard of the safety and health of thousands of people of the city of Dawson. *Salus populi suprema lex.*

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Attorney for Appellant.

DUPONT GUERRY,
CHAS. A. DOUGLASS,
Of Counsel.

January 3, 1905.

FILE COPY.

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(19,152.)

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1904.

No. 154.

THE CITY OF DAWSON, APPELLANT,

vs.

THE COLUMBIA AVENUE SAVINGS FUND, SAFE DEPOSIT, TITLE AND TRUST COMPANY.

Appellant's Reply to Supplemental Brief of John I. Hall and Olin J. Wimberly, Counsel for Appellee.

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THE LAW REPORTER PRINTING CO., WASHINGTON, D. C.

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Appellant's Reply to Supplemental Brief of John I. Hall and Olin J. Wimberly, Counsel for Appellee.

I.

Subdivision I of appellee's supplemental brief attempts to sustain the exclusive feature of the franchise of the water company by the fact that a city in Georgia has the right to provide for a water supply, coupled with the assumed fact that a city of the size of Dawson can not afford to maintain two rival systems of waterworks at the same time. In other words, under such condition, appellee seems to think that the water company acquired a valid exclusive franchise by priority of occupancy of the field, and it seems to be attempting to make applicable the principle of *qui prior est tempore, portior est jure.* That the fact that the city is not large

enough to support two systems could not vest the water company with the sole privilege of purveying water in the city, because first in the field, is too clear to require argument or citation of authorities.

II.

In Subdivision II, appellee contends that there is nothing in the Georgia constitution forbidding the creation of "perpetuities or monopolies." In answer, we will only remind the court that even if true, as contended, monopolies were void at common law and "are not commonly conferred by legislative grant, and need no special prohibition in the organic law of a free republic" (please see pages 90–91 of our former brief, citing Birmingham & Pratt Mines Ry. *vs.* Birmingham Ry., 79 Ala. 465, and the opinion of Mr. Justice Brewer in Bienville Water *vs.* Mobile, 186 U. S. 219, 223).

III.

In Subdivision III, appellee cites paragraph 2 of article 1, section 3, of the Georgia constitution, and paragraph 3 of said article and section, and apparently construes the first of said paragraphs, which forbids the passing of any law making irrevocable grants of special privileges, as practically nullified by the other paragraph, which declares that no grant of special privileges shall be revoked, except in such manner as to work no injustice to the corporators or creditors of the incorporation. It was and is our contention that said paragraph 3 was designed to protect rights which had vested at the date of the adoption of the constitution, or at least if it were intended in any way to protect future grants, its operation is necessarily restricted to grants in terms *revocable*. The two paragraphs are component parts of the same section of the constitution and must be construed together, leaving both with the sense of import. To our mind, there is clearly no conflict from any point of view between the two paragraphs, and even conceding to paragraph 3 all claimed of it by ap-

pellee, yet it is plain that it can have no possible application to such a case as the one at bar, simply because there is not a scintilla of evidence of record to show that the city ever attempted in any sense to revoke any franchise or privilege actually granted the water company, nor was any such issue ever raised in appellee's complaint, yet from beginning to end counsel for appellee seem to have been chained to the delusion that the city had actually revoked the privilege of the water company to operate and maintain a water system and sell water in the city of Dawson.

It must be obvious to this court that the charge that the city revoked the franchise of the water company is mere pretense and that appellee would fasten the *main contract*, the *exclusive* feature claimed, upon the people of Dawson, through the mere agreement by the city corporation to pay water rentals. Not being able to successfully maintain that the city had power to directly grant the exclusive franchise, appellee insists with great persistence that the city indirectly conferred such a franchise by agreeing to buy water, and notwithstanding the water company has not performed and is not able to perform its contract, it was maintained that the city was estopped from pleading the facts of nonperformance and the court below incidentally decreed that the city must pay rentals up to and including the year 1911, whether or not the water company performed, the *chief purpose* of the decree being to protect the water company from *competition*. That there can be no such estoppel as this, we think has already been conclusively established in this case (see our main brief, pages 132 *et seq.*).

It is also contended by appellee that while the constitution may have forbidden grants of special privileges *by law*, yet a municipality may confer them *by contract*. That is to say, that the agent, the city, can do what its principal, the legislature, can not do. Thus, to reduce this contention to its last analysis is to demonstrate its error. Such a contention is fully disposed of in 79 Ala. 465.

IV.

In Subdivision IV, of appellee's supplemental brief, it is contended that to hold that a special privilege is revokable would be to overturn the doctrine that a municipal corporation is just as liable as an individual upon its undertakings. We know of no such doctrine, and appellee seems to overlook that the inhabitants of a municipality have no contractual relations with the city corporation; that such corporation is merely a legislative agency, and can not exceed the specific powers granted by its principal, the legislature, and fasten unlimited liability or deprivation upon the helpless people of the municipality. It must be clear that unless acting within powers, the former city council could not, over protest and contrary to law, and to public welfare, deprive the citizens of the right to a competitive water supply and make them accept for twenty years the foul substitute for water furnished by the water company, or do without.

In this connection, we beg to invite the most serious attention of the court to the variance between the findings of the Master and the decree of the court below. The findings and recommendations of the Master were adopted by the court without exception, and while the Master refused to find whether the city could create competition by granting a franchise to another company, yet the decree of the court not only enjoined the city from erecting waterworks of its own, but also perpetually enjoined it (pr. rec. 167) from entering into any contract or arrangement with any person, firm, or corporation, for the construction, lease, operation, or use of any system of waterworks, or from laying pipes or mains, or permitting the laying of pipes or mains, or from entering into or carrying out any contract for waterworks save and except the contract referred to in complainant's bill. If we understand it, the decree distinctly accords the water company an *exclusive* franchise with reference to the supplying of the city and its inhabitants with water, without qualification, until 1911, and protects it by injunction.

It is palpable that if the city could not expressly grant an exclusive franchise, the chancellor had no power to imply one based merely upon the agreement to pay for license to take water.

V.

In Subdivision V, appellee contends that the right to furnish water to the city does not arise out of the charter of the water company, but from the contract made with the city. In answer to this, we will say that if the city had no power to grant an exclusive franchise, it could not possibly acquire that power by making a contract to pay for water. It must be clear that if it had the power to delegate its duty to another corporation and to deprive the city of a competitive source of supply, it had such power independent of the contract to pay for water for fire protection.

VI.

In Subdivision VI, appellee lays great stress upon the fact that the word "exclusive" does not appear in the Georgia constitution. Appellee's argument under this subdivision needs nothing from us to demonstrate its impotence *to this court*. We merely call attention to pages 83 *et seq.*, of our main brief and especially to pages 90 *et seq.* We take it as conclusively settled that even if the prohibition referred to by appellee had been left out of the State constitution, yet the city would have been not only without power to have granted an exclusive franchise, but also without right to have deprived itself of the power to perform the duties for which created, by delegation to a private corporation. Under this subdivision, on page 21, appellee also takes up the Walla Walla case. Appellee seems to have forgotten in his argument that this court specifically held in the Walla Walla case that the *contract was not objectionable because* there had been *no attempt to grant an*

exclusive privilege; that it was within the powers specifically granted to the city of Walla Walla, by statute, and the city *expressly agreed not to erect waterworks of its own*, and not to avoid the contract except in the manner expressly agreed upon. In the case at bar, it is admitted that the city never expressly agreed not to erect waterworks of its own, yet it is insisted that an exclusive franchise was granted by implication and that the city must pay, performance or no performance, which is the reverse of what was held in the Walla Walla case. Further on in the same subdivision appellee contends in effect that the water company is entitled to a monopoly because, forsooth, "there is no provision in the Georgia constitution forbidding monopolies and trusts." We shall not dignify such a contention by discussing the same before this Honorable Court.

VII.

In Subdivision VII, appellee returns for the third time to the prohibitions contained in the Georgia constitution. For answer we refer to what we have said in Subdivision III, *supra.*

VIII.

In Subdivision VIII, appellee returns again to the prohibitions contained in the State constitution, and for answer we refer to what we have said in Subdivision III, *supra.*

IX.

In Subdivision IX, still contending that it was within the power of the city to grant the exclusive right, appellee says that if the contract is not valid in its entirety, and to the extent of the import of the words taken literally, it is nevertheless to be upheld to the extent that such grant was permissible. In answer, we will say that the city is willing that any lawful part of the grant, if any, be upheld. It has contended, and still contends, however, that no exclusive

franchise was granted, and, if this contention be correct, the corollary is that there is no equitable jurisdiction and the decree and judgment of the circuit court should be reversed and the bill dismissed.

The object of appellee's bill was (1) to enforce the collection of water rentals, (2) to prevent the city from violating its agreement to commute taxes, and (3) to protect from impairment the exclusive franchise alleged to have been granted the water company.

We think we have conclusively established that equitable jurisdiction could not be invoked because of the refusal to pay water rentals (see our former brief, pages 75 *et seq.*).

The court below found that the agreement to commute taxes was void.

It is plain, then, that equitable jurisdiction is predicated solely on the alleged grant of exclusive franchise which was held to exist by the court below.

As it is clear that the city could not have granted an exclusive franchise, the appellee must be denied equitable relief, since its remedies are clearly legal, if it had any rights. But it had no rights because not a cent of principal or interest was due when the bill was filed, and as there was no diversity of citizenship, in so far as complainant was concerned there was not even any subject-matter for jurisdiction, the appellee being at best the assignee of a litigated right.

X.

In Subdivision X, appellee suggests that—

> "it seems to be hardly a sound proposition that the city has the right to contract for water supply for its inhabitants; bind the other party to furnish water to every inhabitant in ample quantities;"

and yet say that the city is without power to stipulate that the company shall have the exclusive right to do what it is required to do; that such a contract binds only the party upon

whom the burden falls. It should seem a sufficient answer to this to say that the company never furnished the required water in ample quantities, and there is no way in which the city could force it to do so, the evidence showing not only that the water company was not able to satisfactorily perform its contract, but also that it was practically insolvent and judgment proof (see pages 145 *et seq.* of our main brief). Besides, the Supreme Court of Georgia held that this contract was operative only from year to year, and that either party could renounce it. We have not anywhere claimed that the water company was any more bound to this contract than the city.

If the city is bound by its contract to pay the water rentals and the water company has earned them, the right to collect them is plainly legal. It is preposterous to say that because the city's contract to pay rentals is valid, the water company acquired an exclusive right; that the citizens of Dawson must take the water furnished, good, bad, or indifferent, or do without, and that the city must pay for the water license whether the performance by the water company has been substantial, merely simulated, or even notwithstanding no performance at all.

XI.

In Subdivision XI, appellee contends that the Joplin case (191 U. S. 150) has no possible application to the case at bar. As we have fully discussed and applied that case on pages 94 *et seq.* of our former brief, we leave it for the court to determine its applicability to this case without further comment.

XII.

In Subdivision XII, appellee returns to the Walla Walla case. In answer, we merely refer to the discussion of this case on pages 88 and 95 of our former brief, and in the present brief under Subdivision VI, *supra.*

XIII.

Subdivision XIII of appellee's brief seems to consist merely of an attempt by counsel to prejudice this court against the city of Dawson. We have no further comment to make in regard thereto.

XIV.

In Subdivision XIV, appellee cites authorities to show that a resolution is equivalent to an ordinance *if passed with all the formality of an ordinance,* and may be a legislative act impairing the obligation of a contract, the allegation of impairment in the case at bar being based upon a resolution passed by the city council of Dawson in 1894. We desire to invite the attention of the court, however, to the fact that this resolution which, it is alleged, impaired the contract with the water company, was not passed with the formality prerequisite to the passage of an ordinance under the charter of Dawson.

Section 15 of the rules for government of the council (pr. rec. p. 230) requires that any proposed ordinance must be read to the council at the meeting when offered—

> "but in no case shall action be taken thereon except by unanimous vote of the council voting an urgency in said matter. At the next or any subsequent meeting of the council, the said ordinance or amendment shall be again read and be subject to such revision or alteration as the council may deem proper," etc.

It will be noticed that counsel for appellee makes no claim that this resolution was adopted with the formality required of an ordinance.

XV.

In Subdivision XV, appellee rediscusses the question of *res judicata* without discovering any matter which we have not fully discussed on pages 102–112 of our main brief.

XVI.

In Subdivision XVI, appellee discusses the construction of the Iowa constitution as to debt limitation. As stated in our former brief, we believe that the court will determine the issue presented here in accordance with the constitution of Georgia, and the construction placed upon the debt limitation therein by the Supreme Court of said State. Said court held that a city can not contract for a supply of water for a longer period than one year, and that a contract for twenty years, each year's supply to be paid for semi-annually from year to year, is operative from year to year only, so long as neither party renounces or repudiates it, citing with approval Cartersville *vs.* Cartersville (89 Ga. 683); Cartersville Water *vs.* Cartersville (89 Ga. 689); Lewis *vs.* Lofly (92 Ga. 804); Habersham *vs.* Porter (103 Ga. 613), and overruling, in part, Spann *vs.* Webster (64 Ga. 898); Cabaniss *vs.* Hill (74 Ga. 845).

Particular attention is invited to the fact that the cases overruled in part were decided long prior to the date of the contract in issue and they were overruled only because the court was disposed to concede more liberal powers to municipalities. In other words, the constitutional prohibition as to indebtedness was more literally and severely construed prior to the date of the contract than since. The fact that the inhibitory provision was more unqualifiedly applied prior to the transaction strengthens the conclusiveness of the more liberal rule subsequently adopted (1892) and maintained without deviation up to the decision of the Supreme Court in the case at bar.

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FEBRUARY 2, 1905.

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In the Supreme Court of the United States

OCTOBER TERM, 1904.

No. 154.

CITY OF DAWSON,

Appellant,

vs.

COLUMBIA AVENUE SAVINGS FUND SAFE DEPOSIT TITLE & TRUST COMPANY,

Appellee.

BRIEF ON BEHALF OF THE
COLUMBIA AVENUE SAVINGS FUND SAFE DEPOSIT TITLE & TRUST COMPANY,
APPELLEE.

THE FRANKLIN PRTG. & PUB. CO., ATLANTA, GA.

NARRATIVE STATEMENT.

On February 21, 1890, the city of Dawson, acting in its corporate capacity, by ordinance entered into a contract whereby R. L. Bennett, his associates, successors and assigns were to become incorporated under the laws of the State of Georgia under the name of the Dawson Waterworks Company, which company, within the time limited, was to construct, complete and have in operation a thorough system of waterworks in accordance with the specifications and plans of the contract, and was, from time to time, to extend its mains and pipes and enlarge its system to meet increasing demands consequent upon the growth of the city. And in consideration of the company's agreeing to furnish a free and unrestricted use of its water for fire protection for a period of twenty years, the city of Dawson undertook and agreed to pay to "said company, or to such trust company as the Dawson Waterworks Company may elect or decide upon as the trustee for their bonds, the sum of $2,000.00 annually for twenty years in semi-annual payments of $1,000 each, on the first days of January and July of each year."

The ordinance provided that a tax sufficient to pay said rentals should be annually levied for that purpose upon the taxable property in said city.

The ordinance required the company to build and have in operation within eighteen months a complete and thorough system of waterworks, to consist of four and eight-tenths miles of pipe of four, six and eight inches in diameter, with a reservoir of not less than forty thousand gallons capacity, "and of sufficient height to produce a pressure on the mains such that from any hydrant located on any principal street a stream of water will be projected fifty feet in still air through one hundred feet of fire hose with one-inch nozzle attached."

The contract contained the following provision:

"That in consideration of the said company agreeing to

furnish water to the public municipal building and further agreeing to furnish water to two public fountains of ⅛ inch nozzle each, the city of Dawson hereby obligates itself to remit to said company, its successors and assigns, any and all license fees, taxes, dues and charges which may at any time hereafter be levied or assessed by said city against said company or upon the plant to be used in said waterworks system."

The ordinance also contained the following provision:

"The said company and their successors and assigns shall be and are required from the completion of their system of waterworks, until their charter shall cease, to furnish a sufficient supply of water for the purposes before and hereinafter mentioned, unless prevented by unavoidable and providential causes; in such event they shall be allowed a reasonable time to make repairs, and if after such reasonable time has been allowed they should still fail to furnish said supply of water, their franchise from that fact be forfeited."

The ordinance provided that its provisions should "be mutually binding upon the city of Dawson and R. L. Bennett and associates and the company to be organized by them in pursuance of the provisions thereof, and it shall have the force and effect of a contract between the respective parties as fully and completely as if it were drawn in that form and signed by the contracting parties."

[Record, pages 287–291.]

The ordinance was unanimously adopted at a full meeting of the City Council of Dawson, was published in full in the local newspaper, and the corporation was duly formed for the purpose of carrying out the contract, and the works duly constructed and accepted by the city after being tested and found to be fully up to the requirements of the contract.

The charter of the city of Dawson, in its general welfare clause, declares:

"Be it further enacted, That the said mayor and aldermen shall have power and authority from time to time, to

make, ordain and establish such by-laws, ordinances, rules and regulations as shall, to them, appear necessary and proper for the security, welfare, convenience and interests of said city of Dawson, and the inhabitants thereof, and for preserving the health, morals, peace, order and good government of the same, and not inconsistent with the Constitution and laws of Georgia."

[Record, page 222.]

As will be seen from the decisions hereinafter quoted, the courts of Georgia have uniformly held that cities and towns in Georgia have authority to provide for water supply, and no restrictions exist as to the manner in which such supply shall be provided, further than the construction recently given by the court to the constitutional provision relating to debt. In fact it will be seen from an examination of the various Georgia cases hereinafter cited, in which municipal contracts for water supply have come before the court, that in none of these cases was there any express provision in the charter of either of the cities touching the subject of water supply, or any authority to provide for water supply further than such as is derived from those general provisions commonly known as the "General Welfare Clause," and which, in several of the charters, is less full than the clause in the charter of the city of Dawson just quoted. And the decision of the Supreme Court of Georgia in the case of City Council of Dawson vs. Dawson Waterworks Company, 106 Ga. 696, hereinafter referred to, concedes that the city of Dawson had authority under its charter to provide for water supply.

At the time the contract was entered into and the works constructed thereunder, there had been no decision by the courts of Georgia that a contract by a municipal corporation for a supply of water, or gas, or like necessary, to be paid for from year to year as furnished, created a debt within the meaning of article 7, section 7 and section 10 of the Constitution of the State. On the contrary, while the precise question had never been expressly decided, the trend of the decisions up to that time and the reasoning of the Court pointed to the conclusion that such a contract did not create a debt within the meaning

of the constitutional provision just referred to; and this Court in the case of Walla Walla *vs.* Walla Walla Water Company, 172 U. S. 1, 20, mentions Georgia as one of the States holding that a contract of this character did not fall within such limitations.

Such, too, was the contemporaneous construction given to those constitutional provisions by the Legislature of the State as well as the courts. For, although by general statute it is provided that cities may enter into contracts with waterworks companies for the supply of water for public purposes (Code of Georgia, sections 2407, 2408, 2409), there was no law prescribing the manner of holding elections to determine the question of incurring any debt for such purpose.

In other States the precise question had been decided, and as the Supreme Court of Georgia frankly states in the decision subsequently rendered by that court in 1899 and above referred to, (106 Ga. 696, 714), the current of authority on the subject was that such contracts did not create a debt within the meaning of such constitutional provision; and in cases decided by our State court prior to the time the contract was entered into, several of these cases are cited with approval.

It will be seen, however, from the record that the qualified voters of the city of Dawson had been given an opportunity to vote on the question of incurring the necessary expense of water supply. On June 11, 1886, the city of Dawson submitted to the qualified voters of the city, by publication of a notice thereof for four weeks in the newspaper in which legal notices were published, the question whether the city should incur the expense of waterworks. The election was held and more than two-thirds of the qualified voters cast their ballot in favor of incurring the expense of waterworks. The result of the election was declared to be in favor of waterworks. It was satisfactory to the voters to leave it to the city council to determine the manner in which the water supply should be furnished, whether by contract with a waterworks company or by municipal ownership, and the city council did not act hastily or unadvisedly, but during the three and one-half years that intervened

between the election and the making of the contract, thoroughly canvased the entire situation, and adopted the plan which they thought most to the interest of the city and its inhabitants. The action of the city council in entering into the contract met the universal approval of the citizens, and during the eighteen months that intervened between the making of the contract (the provisions of which were published in full in the local newspaper) and the completion of the works, it appears from the evidence, that not a voice was raised in opposition to the plan adopted, but the greatest enthusiasm prevailed amongst all classes over the satisfactory solution of the question of water supply.

It will be seen from an examination of the contract that it was the intention of the parties that the supplying of water by the Waterworks Company to the city and its inhabitants was to be exclusive ; that the city would not enter into competition with the Waterworks Company in the declared purpose of the contract "of supplying said city and its inhabitants with water for protection against fire and for domestic, sanitary and other useful purposes." This intention appears from the express language of the contract and the terms and stipulations are such as leave no room for doubt. The contract in its first section grants "the exclusive right and privilege . . . . . of constructing and maintaining and operating a system of waterworks for the purpose of supplying said City and its inhabitants with water for protection against fire and for domestic, sanitary and other useful purposes." In section second, it is declared "that the said Company for the purpose of constructing, maintaining, operating, extending and repairing said system of waterworks *shall have the sole and exclusive privilege* and full power, right and authority to lay water-pipes and mains along any and all the streets and avenues of said City," etc. In section ten, the last section but one of the ordinance, it is provided that the Dawson Waterworks Company, which was to be organized and chartered under the corporation laws of the State, was to have "*the exclusive right to construct, maintain and operate a system of waterworks in said city of Dawson for the purpose of supplying said city, its in-*

habitants, citizens and residents with water for protection against fire, and for domestic, sanitary and other useful purposes." Section eleven of the ordinance which constitutes the contract, is in the following words:

> "That the provisions of this ordinance shall be mutually binding upon the city of Dawson, and R. L. Bennett and associates, and the company to be organized by them in pursuance of the provisions thereof, and it shall have the force and effect of a contract between the respective parties as fully and completely as if it were drawn in that form and signed by the contracting parties."
>
> [Record, pages 288, 210, 211.]

On November 12, 1889, about three months before the contract was entered into, the General Assembly of the State of Georgia passed a general act conferring on corporations or persons "constructing, owning, operating, or carrying on waterworks in this State" the right of eminent domain, by which they may acquire all land or easements of land "necessary or proper for the construction and successful operation of waterworks" by condemnation proceedings instituted and conducted in the manner provided by the Code. This act is codified as sections 2407, 2408, 2409 of the Code of Georgia (edition of 1895). The said act confers the privileges therein mentioned upon waterworks companies, or individuals supplying water for public purposes to municipal corporations, and to none others, the language used as to such purposes being as follows:

> "None of the provisions of the two preceding sections shall become operative until after the said corporation, company, or individual shall have *bona fide* entered into a contract with the proper authorities of some incorporated city or village of this State for supplying water for public purposes."

There is nothing in the Constitution or the laws of the State of Georgia, or in the charter of the City of Dawson, or in the above named act, to restrict the power of the city to contract with one company or individual for an exclusive supply of water

for such reasonable length of time as may be fixed by the contract. There is nothing in the act to indicate that it was the purpose of the Legislature to so limit and restrict the city as to forbid that it should contract for its entire supply from a single company, or that the city should not be permitted to contract that it would not itself enter into ruinous competition with the water company during the life of the contract, while the water company was faithfully carrying out the obligations of the contract on its part. Nothing in the Constitution or laws of this State requires that a city, exercising the business power of contracting with a company for supplying water for public purposes, should reserve to itself the power of wasting the public funds and the moneys of the taxpayers by establishing its own system of waterworks for supplying water that was to be supplied under a valid and binding contract with the water company for such purposes; thus incurring large expenditure for something that the city does not need because already supplied with it. It is to be supposed that in authorizing incorporated cities and villages to contract with a corporation for its water supply, the Legislature must have contemplated well known business conditions. It is a matter of public knowledge that in establishing a system of waterworks the company would necessarily incur a large expense in the construction of the power-house and the laying of its pipes through the streets, and as the life of the contract is limited, business considerations would naturally lead the water company to desire to protect itself from competition as far as possible; and that such company naturally would not care to enter into a large undertaking of this character unless it could by fair and legitimate provisions in the contract be protected against the possibility that the city might enter the field and embark upon competition which would be ruinous to the company and thus practically extinguish the rights the city by such contract had granted to the company. It is well known that in small towns such as Dawson (and such towns constitute the vast majority of the cities and towns in Georgia), it is wholly impracticable to successfully operate more than one waterworks system at the same time. It will be seen

that the city has itself recognized this fact, and only embarked upon its purpose of constructing a waterworks system of its own, after it had declared by ordinance that it would no longer be bound by or carry out the provisions of the present contract.

The money necessary to construct the waterworks was raised by the issue and sale of bonds for that purpose. This fact was known to the city. In the original ordinance of February 21, 1890, constituting the contract between the parties, the city agreed to pay the hydrant rentals to the Dawson Waterworks Company or to such trust company as the Dawson Waterworks Company might elect or decide upon as the trustee for its bonds. After the contract was accepted by Bennett, Bennett assigned the same to the American Pipe Manufacturing Company, the city of Dawson expressly consenting to the transfer, and later the Dawson Waterworks Company was duly chartered for the purposes specified in the contract, and the contract was by the American Pipe Manufacturing Company duly assigned to said Dawson Waterworks Company. When the American Pipe Manufacturing Company purchased the contract from Bennett, it addressed to the city council of Dawson a communication stating that it had purchased the franchises of R. L. Bennett to build waterworks in the city and asking for an extension of sixty days to beg in the work, in order to have time to market the bonds. The city adopted a resolution granting an extension of sixty days for that purpose, reciting in the resolution that the sixty days had been asked "in order to get time to market bonds." (Printed record, page 306.)

It appears that an arrangement was made whereby it was agreed on behalf of the proposed company that as soon as the works were completed, the Dawson Waterworks Company was to issue bonds in the amount of $40,000.00, secured by mortgage on all its property, including its franchises under the aforesaid waterworks contract, and the aforesaid hydrant rental of $2,000.00 per annum; and that said bonds were to be turned over to the American Pipe Manufacturing Company in consideration of the money which said Pipe Company was to furnish to construct the works, that the money necessary

to construct the works, to wit, $40,000.00, was furnished by the American Pipe Manufacturing Company under this agreement, and the Bonds were duly issued and turned over by the Dawson Waterworks Company to the American Pipe Manufacturing Company for whom they were sold. The Columbia Avenue Savings Fund Safe Deposit Title & Trust Company was selected to act as trustee. It is a trust company of high character, and before consenting to act, the president of the company undertook to make a thorough examination in order "to judge whether it was a reputable, proper and good business transaction." For that purpose he went to Dawson. The mayor and city council had been advised of the purpose of the visit. The mayor and the members of the city council met him in carriages and went with him all over the town; they showed him the source of supply; the different parts of the system were pointed out; he met various representative citizens and interviewed the people of Dawson. Everybody was thoroughly pleased with the system of waterworks and the method adopted to give them a water supply. The legal questions were investigated and satisfactorily reported upon. The president of the trust company, upon returning home, took the matter up with the board of directors, and it was determined that it was a reputable and safe business transaction, and that the company could afford to take charge of and recommend the bonds. The company accepted the trusteeship, recommended the bonds, purchased a large block of them itself, and the others were all sold to various purchasers of high character and standing, of which a list appears in the record. The bonds were sold at what is shown to be an exceptionally high price for securities of that character, particularly Southern securities. (See in particular testimony of J. K. Cuming, pages 706, et. seq. of the Printed Record.) That visit was in August 1891. The mortgage and bonds were made and dated September 1, 1891, and the bonds were sold, most of them, within a few months thereafter. Those first sold brought 92½ and some of them were afterwards sold at 100. The mortgage or trust deed covers all the real estate and personal property, the rights

and franchises, privileges and appurtenances of the Dawson Waterworks Company, together with improvements, rents, income, earnings, issues, profits, etc., and in particular "any and all income now or hereafter payable to the said Dawson Waterworks Company under any agreement made between the said company and the city of Dawson, Ga., aforesaid, or payable under any ordinance of the said city, and also any and all income now or hereafter payable to the said company under any agreements that may be made between it and any other corporations, individuals or partnerships.

With reference to the payment of interest on the bonds, the mortgage contains the following provision:

> "The yearly rental which the city of Dawson, Georgia, binds itself to pay in accordance with the terms of the franchise granted by the said city February 21 1890, amounting in the aggregate to $2,000.00 per annum, payable semi-annually, (shall be) paid into the hands of the trustee of the mortgage bonds for interest purposes on said bonds, and in case the city of Dawson contracts to increase the number of fire hydrants, the income or yearly rental shall also be paid into the trustee's hands for said purpose of paying interest upon the first mortgage bonds, and should there be any money received by the trustee from said sources in excess of the amount required to meet interest on the bonds, such excess shall be returned to the Treausurer of the Dawson Waterworks Company." (Printed Record, pages 298-299).

It appears from the evidence that the bonds were recommended by the trustee, and purchased in reliance upon the contract with the city; that the fixed rental of $2,000.00 for fire protection, being within $400.00 of the interest charged, and the other features of the contract between the Waterworks Company and the city, gave the bonds their value, and the bonds were purchased upon the strength of the contract with the city and in the belief that the city would in good faith carry out the contract. (See testimony of J. K. Cuming, pags 733, 734, 735, 736; testimony of Penrose D. Curtis, page 752; H. E. Hooper, page 753, Printed Record.)

The American Pipe Manufacturing Company having completed the works for the Dawson Waterworks Company, and being ready to turn the same over to the Dawson Waterworks Company to be operated by that company in carrying out its contract with the city, the city was so notified, and a thorough test was had by the city. Upon such test it was found that the works fully came up to the requirements of the contract, and the system was accepted by the city by ordinance as follows:

> "After testing the waterworks a formal acceptance in writing was made to the American Pipe Manufacturing Company and the following was ordered to be entered upon the minutes, viz.:
>
> "'The city council of Dawson, Ga., hereby accept from American Pipe Manufacturing Company, successars to R. L. Bennett & Co., the system of waterworks as fully complying with contract of R. L. Bennett & Co., and afterwards transferred to American Pipe Manufacturing Company. After fully testing the system, the same is hereby accepted from this date, in full compliance of said contract and in many particulars exceeding contract and none being less than called for in contract.'" (Printed Record, page 307.)

The works being completed and accepted by the city, the service and fire protection contracted for were furnished by the waterworks company, and the city on its part regularly and punctually paid the semi-annual installments of water rent as the same fell due for about three years. During that time it is shown by the uncontradicted evidence that the service was entirely satisfactory. No record was kept of the number of fires occurring during that time, and the number can only be arrived at by approximation. Later, when there was such record kept, it appears from the report's of the fire department, that the average number of fires to which the fire department was called, and the water used, was about twenty per year, and as the city had not varied greatly in population during this time, it is fair to assume that this would not be far from the average number of fires occurring yearly during the latter half of 1892 and 1893 and the first half of 1894. At none of these various fires during

that time was there any failure of pressure, nor was there during that time any complaint as to the quality of character of the service in any particular. Notwithstanding the bitterness injected into the case by the stubborn and protracted effort of the city to repudiate its contract, and the strong personal, partisan bias of the witnesses intent upon breaking the contract, not a witness recalled, or thought that he recalled, a single fire during that time at which the pressure was not in every way up to the requirements of the contract and absolutely unexceptionable.

Before the American Pipe Manufacturing Company purchased Bennett's franchise, they wished first to ascertain whether the source of water supply was satisfactory, and so wrote the city. The city thereupon selected the four places which seemed most likely to be suitable, and sent samples of the water from each to Prof. H. C. White, State Chemist, for him to analyze. Of him the mayor (himself a physician of high standing) writes: "I will say Prof. White's analysis will satisfy all concerned. He is the peer of any man in his profession." (Letter of W. B. Cheatham, M,D., Mayor, to American Pipe Company, of March 4,1891, page 308 of Printed Record.)

On March 14, 1891, the mayor wrote a letter to the American Pipe Manufacturing Company, enclosing analyses of the waters made by Prof. H. C. White, the State Chemist, and also a resolution of the city council as follows:

> "Mayor Cheatham submitted report on analyses of water by Prof. White of Athens, Ga., upon which the following resolution was passed and unanimously adopted:
>
> "'Resolves that the water supply from either or all of the places where sample of water was taken, for analysis made by Prof. H. C. White, namely, number one, spring at Dunn Spring; number two, creek above bridge; spring three, at James Lee's, and spring four, on Dr. Farrow's farm, is accepted as supply for water to fill contract and franchise granted R. L. Bennett and associates.'" (Printed Record, pages 309, 310, 311, 306.)

On March 17, 1891, shortly after receiving the mayor's letter and enclosures, the Pipe Company purchased the fran-

chise. Of the four sources, all equally good according to the analyses, that one was selected which was alone of amply sufficient quantity. It does not appear that any other source equally good, when both quality and quantity are considered, existed then, or exists now. It appears that the quality of water furnished was entirely satisfactory to the city and its inhabitants.

The stockholders, directors and officers of the Dawson Waterworks Company are residents of Philadelphia, Pennsylvania. They have no officer or representative at Dawson, except a local superintendent.

The city, as shown by the correspondence in evidence, recognizes, and has always recognized, that all business matters that arise are dealt with and determined at the Philadelphia office, and all complaints made to the Philadelphia office are promptly attended to.

No complaint was ever made as to the quality of the water. No request was ever made for filtration, or anything looking to the improvement of the quality. No dissatisfaction existed during this entire time as to the wholesomeness or purity of the water. At the time the source of supply was adopted, the analysis furnished by the State Chemist showed that the water was "Faintly turbid, slightly colored by vegetable matter in solution. Slightly organic sediment on standing. Organic impurity slight and entirely unobjectionable. A pure, safe water."

The general superintendent of the company made occasional visits to Dawson, and while there saw and consulted with the mayor, members of council and various consumers of water. No dissatisfaction whatever existed. No improvement or change was suggested.

On September 7, 1891, less than one month after the waterworks were accepted by the city, and the company began to furnish water, the city caused to be passed by the General Assembly an act entitled "An Act to Protect the Water Supply of the Waterworks of the City of Dawson and Providing Police Protection, and for other purposes." (Printed Record, pages 271, 272.) By this act police supervision of the city of Dawson was extended over the territory embraced in the water shed, and the

city was fully empowered to take all necessary steps for its protection, and this law is still of force.

On June 27, 1894, the City Council of Dawson passed an ordinance as follows:

> "The matter of purchasing the Dawson waterworks was next considered. Several letters and answers relative to same were read and considered, and after thoroughly discussing the same, Alderman Davis introduced the following resolution:
>
> *Resolved*, That the city of Dawson decline to carry out the contract as to water for city purposes of the former council with the Dawson Waterworks Co., and that a committee be appointed to make such arrangements as will be satisfactory with the Council and Waterworks Co."

At the time this ordinance was adopted, negotiations were pending between the city of Dawson and the Dawson Waterworks Company, looking to a purchase of the waterworks system. These negotiations began in May, 1894. At that time J. H. Dawes, General Superintendent of the company, was in Dawson on one of the visits that he made from time to time to the city. While there he was approached by the Mayor, who stated to him that it was the desire of the city to own and operate its own waterworks system, believing that they could operate it more economically than they could purchase fire protection from the company, and asked that the company fix a price at which it would sell the plant to the city. Mr. Dawes stated to him that when he returned to Philadelphia he would take the matter up with the company, and the company would write him regarding the sale; that it was always the wish of the persons who owned the stock control of the Dawson Waterworks Company, whenever a city wished to own and operate the system, to sell.

On his return to Philadelphia, the waterworks company, through its treasurer, wrote a letter to the mayor, dated May 31, 1894, referring to the conversation with Mr. Dawes, and suggesting that the city address a letter to the Dawson Waterworks Company embodying what it desired, so it could be laid before

the board of directors, stating that the company would consider the question, and answer fully, and further stating that it was the sentiment of his company, where a town preferred to own and operate its waterworks, to meet its views whenever possible.

On June 5, 1894, the city, through its mayor, wrote to the Dawson Waterworks Company a letter stating that it was the wish of the city to own and operate the waterworks, and with this in view, it would be pleased to know at the company's earliest convenience the best terms and price at which the works could be secured by the city. To this letter the company replied as follows:

> "Mr. A. J. Baldwin, Mayor, Dawson, Ga. Dear Sir:—Your esteemed favor of 5th requesting us to name a price for the Dawson waterworks was received two days after our monthly meeting of our board. We will lay the communication before them on the next regular meeting of our board early in July.
>
> "The works can only be disposed of subject to the bonds issued on them, amounting to $40,000.00 at 6 per cent. I do not see how it will be possible for your city to obtain what you now have, if you buy the works, for the same amount it now costs you per year, because we can not get sufficient income to pay interest, fuel, wages and taxes."

In reply to this letter the city passed the resolution of June 27, 1894, above quoted.

The finding of the Master on this point is as follows:

> "In repudiating its contract with the waterworks company the city did not base its claim upon any inadequacy of supply, inefficiency of service or quality of water furnished by the water company. The system had been in operation for three and one half years, its water supply being derived then as now from the sources designated and approved by the city. During these years the surface washings from adjoining hills flowed into the stream during times of rain, and on such occasions the water was muddy. There was no request on the part of the city for the waterworks company to supply protection to the water shed other than as existed then and now; nor was any request

made that the water be filtered, or that the water tower be increased in either height or capacity. The city predicated its right to renounce the contract upon the ground of a want of authority in the preceding administration to bind the city by such a contract, for that it created an indebtedness forbidden by the constitution of the State. The evidence makes it clear that the city was moved to this action, not only because it considered that it had the right so to do, but also because the contract was regarded as unfair and exorbitant. The facts and surrounding circumstances disclosed the evident purpose on the part of the city to either purchase the waterworks at a price satisfactory to it, or to make new agreements on more favorable terms for use of the water from year to year, or to construct and operate its own system of waterworks." (Record page 92.)

These facts so found by the Master, are undisputed. The Mayor and the majority of the members of Council who passed the ordinance, testified as witnesses. It was not claimed by them or either of them that any dissatisfaction or complaint, or cause of complaint, existed at the time. The resolution of June 27, 1894, repudiating the contract, was adopted at the next meeting of Council held after the letter from the Waterworks Company was received in which it was stated that the works could only be purchased subject to the issue of $40,000 of bonds thereon.

It appears that the city, before hearing from the Waterworks Company as to the price, had planned to raise money to purchase the works by a bond issue, and wished to limit the bond issue to $35,000 out of which it was expected to use $10,000 in constructing an electric light plant, and the remaining $25,000 in the purchase of the waterworks. It was expected that the ordinance repudiating the contract would lead to a reduction by the Waterworks Company of the price at which the company and its bondholders would be willing to sell.

On the same day that the resolution was passed, the City of Dawson, through its committee appointed for the purpose, addressed to the Dawson Waterworks Company a communication as follows: (Record p. 318):

DAWSON, GA., June 27.

Dawson Waterworks Company, Philadelphia, Pa.

GENTLEMEN: The City Council of Dawson at their meeting this day has determined not to continue the contract with your company, by which the city pays two thousands dollars per annum for water. Therefore we write to notify you that the City Council will not be bound by any contract heretofore made with you for water. We would be glad for you to send a man here to confer with us and let us come to some agreement by which the friendly relations of the past can be continued.

Yours very truly,

W. H. DAVIS,
Chairman Committee.

The Dawson Waterworks Company, on June 28, 1894, before any notice was received of the city's action in repudiating the contract, wrote to the Mayor of Dawson, as follows: (Record p. 316):

PHILADELPHIA, June 28, 1894.

Mr. A. J. Baldwin, Mayor, Dawson, Ga.

DEAR SIR: Our board of directors met yesterday. Your communication was laid before them, and passed a resolution authorizing me to offer you the Dawson Waterworks, which is represented entirely by stock, it being a duly incorporated company, at the rate of 10 per cent. on its par. The Company has outstanding $40,000 of bonds, bearing 6 per cent. interest, and none held or owned by this company, and its capital stock is $40,000, and this we offer to you and propose to deliver for 10 per cent. or $40,000, turning the company over to you free of all debts. The bonds of course remain outstanding and would have to be taken care of when interest is due by you. If you would prefer to retire the bonds you could possibly purchase a large number of them very close and possibly at par. If the proposition proves satisfactory, we can make the transfer at any time.

Yours very truly,

WM. S. PEROT, JR., TR."

The City replied, through its Mayor, as follows: (Record page 317):

"DAWSON, GA., July 3, 1894.
Dawson Waterworks Co., Philadelphia, Pa.

GENTLEMEN: In reply to yours of 28th, will say at a meeting of our council held on Monday evening 2d, your proposition of $40,000, and 10 per cent. addition for your waterworks was considered, and it being so far in excess of their expectations will say they can not buy. Will state also that our council has been enjoined from the payment of or issuing order for July payment.

Respectfully,

A. J. BALDWIN,
Mayor, for Committee."

In connection with the Ordinance of June 27, 1894, the City, as soon as the same could be prepared, caused a petition, in the nature of a bill for injunction, to be brought in the Superior Court of Terrell county, Georgia, by A. J. Carver, J. W. F. Lowry and T. O. Whitehard, as tax-payers of the City of Dawson, whereby the court was asked to restrain the City of Dawson from paying to the Dawson Waterworks Company the installment falling due July 1, 1894, for water used by the city under the contract for the preceding six months, or from paying for the water in the future. It is undisputed that this suit was brought at the instance and by the procurement of the City of Dawson in order to give effect to the resolution already passed by the city in repudiating the contract, and was prosecuted in the name of the plaintiffs by the salaried City Attorney of the City of Dawson, ostensibly to restrain his client who was paying him to procure the injunction against it. The injunction was granted on June 29, 1894. In this friendly suit an injunction was only asked against paying for the water furnished the city for fire protection. There was no prayer to restrain the city from using the water so furnished. While this suit was pending the City of Dawson continued to use the water exactly as theretofore. Upon the hearing the absurdity of restraining the city from paying for services which both the plaintiff, acting on behalf of the city, and the city itself contemplated that the city should continue to receive and enjoy, was apparent to the court, if not to the city and the friendly plaintiffs, and the injunction

was refused. These facts are none of them denied. (Record p. 409).

On July 3, 1894, the Waterworks Company having received notice of the injunction, wrote the Mayor, inquiring "if the city intends to take the side of sustaining an honorable contract, or do they propose to try to repudiate it." (Record pp. 316, 317).

To this inquiry, the city, through its Mayor, replied as follows: (Record p. 317):

DAWSON, GA., July 6th, 1894.

MR. WM. S. PEROT, Jr., Tr., Philadelphia, Pa.:

DEAR SIR: In reply to yours of 3d, I note your remarks saying "after you induced us to spend over $40,000 there." If you mean by "you" that it was either myself or any of the present board that induced you in any manner to make the investment, you are mistaken in the matter, for as I understand it this board was elected by parties opposing the contract made by former council, not that they opposed waterworks, but the terms and price they think exorbitant.

The contract you refer to is not a contract made by this council but by a former council, and this council does not feel morally bound to carry it out; it is simply a legal question. If you are unfortunate in making an illegal contract you have only yourselves to blame. As to the amount due July 1st, $1,000.00, will say this council would have drawn warrant for same but for the injunction. As our committee wrote you this council would decline to carry out contract of former council further than July, 1894. We hoped that we might get proposition from you to furnish us water at a price which we felt the city would be able to pay. I assure you that this council will not repudiate any legal contract.

Yours very truly,
A. J. BALDWIN, Mayor.

It will be seen that the only complaint the city had to make was that "the terms and price they think exorbitant." It will be seen by a comparison of the price charged for hydrant rental that so far from being exorbitant the price is less than that in the various reported cases, even where the number of hydrants was much greater than those furnished the City of Daw-

son. The prices charged private consumers were extremely reasonable, being in fact considerably less than the rates allowed by the contract. Attention, however, is called to the city's contention, as showing that there was up to this time an entire absence of complaint or dissatisfaction as to the adequacy of supply, efficiency of service, or the quality of the water furnished.

The city having thus failed in its plan of continuing to enjoy the use of the water while being restrained by injunction from making payment therefor, changed its mode of procedure.

Having submitted itself to the jurisdiction of the court, and by its answer offered to carry out the judgment of the court, and the court having, upon the hearing, refused the injunction seeking to restrain the payment of the installment falling due July 1, 1894, the city paid that installment. Adopting the suggestion found in the decision of the Supreme Court of Georgia in the case of Cartersville Improvement, Gas and Water Company *vs.* Mayor and Aldermen of Cartersville, 89 Ga., 683, that a contract of this character, entered into without the preliminary sanction of a popular vote, is good only as a contract from year to year and that either party can terminate it at the end of any year, but so long as the citizens and the city receives the services contracted for, it must pay for such service, the city decided to plant itself upon the proposition that it was liable only up to the end of the current year, 1894, and not thereafter. Instead, however, of paying the full one thousand dollars, the city undertook to assess against the water company city taxes for the years during which the waterworks had been in operation, and deducted the amount of such taxes from the thousand dollars, paying the balance to the water company. As will be pointed out more fully hereafter, the contract stipulated that the water furnished by the water company to the city for its public municipal buildings and street fountains should stand in lieu of taxes, and in furnishing the water for such purposes the company had already in substance and effect paid the taxes. The same case in 86 Ga., 683, relied upon by the city to support its contention that the contract was only good as a contract from year to year, holds that a stipulation that services of this char-

acter shall be received by the city in lieu of the payment of taxes is valid.

We shall not at this place discuss the case of Cartersville Improvement, Gas and Water Company *vs.* Mayor and Aldermen of Cartersville, 89 Ga., 683, further than to say that it was rendered two years and a half after the contract was entered into, and subsequent to the expenditure of all the money arising from the sale of the bonds in the construction of the waterworks plant. It is what is known as a "head note decision," that is to say, a decision in which the court filed no opinion. As will be seen in the discussion further on in the brief, the decision of the Supreme Court of Georgia upon this subject fluctuated greatly between that date and the decision of the case in 106 Ga., 696, decided seven years later.

It will be seen from the Cartersville cases, 89 Ga., 683 and 689, it is distinctly held that so long as the city continues to accept the benefit of the service furnished under the contract, it must pay for it. This was again held in the case of Dawson Waterworks Company *vs.* Carver, 95 Ga., 565, being the decision of the Supreme Court of Georgia in the above mentioned injunction case brought by Carver, Lowry and Whitehard to restrain the city from paying for the water it had already used. When this last case was decided the court was not prepared to hold that such a contract was invalid as creating a "debt," the decision being as follows:

> "There was no error in refusing to enjoin the payment by the city for the water it had already consumed, whether the contract between it and the waterworks company for the full period contemplated thereby was valid and binding upon the city or not; but at the hearing of the application for the interlocutory injunction, the question of the validity of this contract for future supplies of water was not properly for determination, and therefore nothing stated with reference to this question in the order passed by the presiding judge is conclusive upon the parties."
>
> 95 Ga., 565, Dawson Waterworks Co., *vs.* Carver, *et al.*

On October 4, 1894, before a decision had been rendered by

the Supreme Court in the case of Dawson Waterworks Co. *vs.* Carver, *supra*, the city passed an ordinance calling for an election to take place on November 14, 1894, to determine by a vote of the qualified voters of the municipality whether the city "shall issue bonds for the purpose of buying or erecting waterworks." (Record p. 326.) It was the expectation of the city that a decision would be rendered by the Supreme Court as to the validity of the waterworks contract prior to the date fixed for the election. On November 5th, 1894, it having become apparent that a decision of the Supreme Court would not be rendered prior to November 14th, the date fixed for the election, an ordinance was passed calling off the election for November 14th, and ordering the same for December 12th, 1894. The decision of the Supreme Court was rendered November 26th, 1894.

As it decided nothing as to the validity of the contract, the city proceeded to hold the election on December 12th, 1894, but determined not to actually issue the bonds authorized by the vote at such election until the city could thereafter invoke a decision by the court upon the question whether the existing contract was valid or otherwise. The city, therefore, on December 14th, 1894, two days after the election was held, and on the day immediately succeeding the night of the council meeting at which the result of the election was certified by the managers, through its Mayor, addressed to the American Pipe Manufacturing Company a commu nication as follows (Record p. 497):

Dawson, Ga., December 14th, 1894.

American Pipe Manufacturing Co., Philadelphia, Pa.:

Gentlemen: The contract entered into between the City of Dawson being illegal it will require annual contracts. By direction of the city council of Dawson, I write to know what your company will charge the city council of Dawson for the use of water in the same way heretofore used by them from January 1st, 1895. We think the amount heretofore charged is entirely too much per annum, in fact, exorbitant. If your company will make reasonable terms we will enter into a contract with you

for one year from January 1st, 1895. If we can not agree you will please consider this as notice that this council will not longer be liable under your contract after January 1st, 1895.

A. J. Baldwin, Mayor.

The Dawson Waterworks Company replied to this letter, calling attention to the fact.

"That the contract which was entered into between this company and the City of Dawson was done in good faith, and as far as we are concerned was fully and honestly complied with, and that we have ever since fulfilled our part of the agreement in each and every particular; and that we fully believe that our contract with your city is a legal one; and that the charge made to your city for hydrant rental is an extremely reasonable one."

And in this letter the company state that:

"We shall continue to maintain our fire pressue in future the same as in the past, and your city fire department will find our fire hydrants ready for servive whenever they may be required; in fact always ready for use. We shall present our bills for hydrant rentals to your city when due, and shall expect the city to pay same."

Record p. 431

The city declined to pay for the water furnished during the year 1895, as well as during all subsequent years. The contract required that the city make provision for the annual payment of said hydrant rentals by levying a tax for that purpose upon the taxable property of the city. This the city refused to do, planting itself upon the ordinance, that it was not bound by the contract and would not carry it out.

During these various years fires occurred, at all of which the water was used, with the city's knowledge and by its authority by the fire deparment existing and acting under an ordinance of the city, and using the city's hose, reels, spanners, and other fire apparatus. By the use of the water not only was insurance rates greatly reduced, but many thousands of dollars of valuable property has been saved. At one particular fire the water

used prevented the spread of a conflagration which would have destroyed practically the entire business portion of the city, property worth some $250,000, or about one fourth of the entire taxable value of all the property contained in the city.

The hydrant rentals falling due July 1, 1895, and January 1, 1896, covering the use of the water for the year 1895, were presented for payment by the waterworks company to the appropriate city officials, and shortly after January 1, 1896, an action at law was brought by the Dawson Waterworks Company against the City of Dawson for the recovery of $2,000, the amount of said hydrant rentals for the year 1895. Inasmuch as in the Cartersville cases (89 Ga. 683, 689, *supra*) relied on by the city as supporting its contention that the contract was invalid as creating a debt, it was distinctly ruled that if the city continued to use the water it must pay for it, and in the case of Dawson Waterworks Co. *vs.* Carver, 96 Ga. 565, *supra*, it was further ruled that so long as the city continued to use the water for fire protection it must pay for it, and the question of the validity of the contract could not arise for decision, in order to accomplish its purpose of invoking a decision that the contract was invalid, it was necessary for the city to assume the position that it was not using the water. The city, however, well knew that the city could not afford to be without fire protection during the time that might intervene before a final decision could be reached in the case. The election of December 12, 1894, had been carried for the issue of bonds upon assurances that the people of Dawson would enjoy fire protection until such time as the city could purchase the waterworks, or erect its own system. The citizens of the town would never submit to being left without fire protection during the time; the insurance companies would increase rates; and the Mayor and council did not care to face the issue of leaving all the property within the city without any protection from fire. While, therefore, the mayor and council "officially" ordained that the city was not using the water, the same mayor and council, and all of the officials of the city, as well as citizens, united in bringing it to pass that the water should be used precisely as theretofore. Within a very

few weeks after the city had solemnly proclaimed that it would not further use the water, at the first fire which occurred, the fire department, in the presence of the mayor and various members of the council, used the water with apparatus belonging to the city and furnished them by the city for the purpose. The mayor himself in person handled the hose and pointed the nozzle that directed the chief stream upon the fire.

The city ordinances prescribing the duties of the chief of the fire department, and the officers and members of the different companies composing the fire department, remained unrepealed. Those ordinances empowered the fire companies, and made it their duty, to take charge of the engine, hose, and other apparatus which belonged to the city, and directed that they should be used in extinguishing fires, and provided various penalties for a violation of the ordinances. One of the offenses for which punishment was provided was "the use of said implements except for the benefit of the city."

With the knowledge of the Mayor and Council, and under valid ordinances of the city, the fire department used the apparatus in the extinguishment of various fires with the water furnished by the waterworks company under its contract for that purpose, and with the city's knowledge that it was being furnished under the contract, and that the waterworks company would expect pay therefor as provided by the contract. The city not only furnished to the different fire companies hose and other apparatus for the purpose of using this water, and with full knowledge that there was no other water which could be used, but during the time bought additional hose and other apparatus needed in using the water. No other source was provided by the City Council, and no other water existed that could have been used; the few cisterns that had existed before the waterworks were constructed had most of them fallen into disrepair, and the water in such of them as would hold water was water furnished by the waterworks company for that purpose under its contract. The engine that had been used in raising the water out of the cisterns so as to throw streams upon a fire was out of repair and very seldom used, and the city

ceased to employ an engineer to run it, but relied upon the pressure furnished by the waterworks company. It was of course known to the city that if any water were in the cisterns it could not rise up in the hose against gravity, and the hose which it was the duty of the fire department to use could only be employed in the use of water under sufficient pressure furnished by the waterworks company. The persons belonging to the various fire companies received for their service exemption from street taxes by order of the mayor and council representing the city in its official capacity. This continued during the time that followed the city's repudiation of the contract exactly as theretofore. Two of the three fire companies kept up their regular organization, held regular meetings, elected officers, were governed by by-laws, and complied with the ordinances of the city ordained for their government. The other fire company still turned out at the various fires; its members were still exempted from street taxes, and were still furnished by the city hose and other apparatus for extinguishing fires.

Not to go more into detail on this subject, we quote from the Master's finding as follows: (Record p. 90):

> "The water has been continuously used on the occasions of numerous fires and whenever so required. The city claims that notwithstanding that its officials participated in this use of the water, their action was that of any citizen in an emergency, and was not authorized by the city in its corporate capacity.
>
> I find that the city fire organization was maintained during the years following 1894 as it was in preceding years. While at times this organization was not in an efficient state, it was never disbanded. The city continued to furnish hose and fire apparatus and to grant to members of fire companies exemption from municipal street taxation. No other means for fire protection was afforded by the city, so that it must have been recognized that in any emergency of fire resort to the use of the water of the waterworks company was necessary and inevitable. The city did not forbid the use of this water by its fire department, and must have known that it was being continuously so used.

In 1898, prior to the filing of this bill, the city brought its fire department up to a higher state of efficiency with a paid chief at its head.

I accordingly find that notwithstanding the city had repudiated the contract, it has continued to enjoy the fire protection afforded by the waterworks company and to use the water for that purpose on every occasion, in the same manner and to the same extent that it did prior to its repudiation of the contract."

Notwithstanding these facts, the city, in order to put itself in a position to question the validity of the contract, in its answer to the action brought by the Dawson Waterworks Company for the collection of the hydrant rentals for the year 1895, set up as a part of its defense that:

> "In answer to the second paragraph, defendant says it is not true that the plaintiff furnished water to the city for the year 1895, for the reason that the city did not use any water during said year, and had on December 14, 1894, formally notified plaintiff that they would no longer be bound by said contract and would not use the water." (Record, page 458.)

Upon this issue the defendant went to trial, and contended both in the court below and the Supreme Court, that it had not used the water, attempting to draw a distinction between the use of the water "officially" and that kind of use of the water which puts out fires.

The case came on for trial at the November Term, 1896, of Terrell Superior Court, and the court directed a verdict in favor of the plaintiff. The City of Dawson took the case to the Supreme Court of Georgia. In the Bill of Exceptions, which the trial Judge through error certified to be true, the copy of the waterworks contract, as set forth therein by the attorneys for the city of Dawson, wholly omitted the following clause:

> "The Council shall, and they are hereby required, to make provision each year for the payment of two thou-

sand dollars as provided in the foregoing section, by levying a tax sufficient for that purpose upon the taxable property of the city."

The trial Judge, to whom the bill of exceptions was tendered by the attorneys for the city of Dawson, did not notice the omission but certified that the Bill of Exceptions truthfully set forth the evidence in the case. Under the law of Georgia there is no provision for correcting a Bill of Exceptions or challenging the truth of its recitals. In the Supreme Court of Georgia the attorneys for the city of Dawson urged as a reason why the case should be reversed, that it did not appear from the contract set out in the Bill of Exceptions that the city made provision for the payment of the hydrant rentals, that the contract was therefore invalid under paragraph 1, section [illegible] of the Constitution of Georgia. The case was reversed solely by reason of the fact that the attorneys for the city of Dawson had thus omitted from the contract a material portion thereof, and afterwards had urged in the Supreme Court that the contract was void because the provision thus omitted did not appear to have been contained therein. The decision of the Supreme Court of Georgia is in the following words:

"This being an action against a municipal corporation for a year's supply of water, in which the plaintiff's right of recovery depended upon the validity of an alleged contract between it and the defendant, covering a period of years, and the evidence not affirmatively disclosing that when the contract was originally made the municipal corporation had, in the manner prescribed by the Constitution of this State, made due and lawful provision for the payment of the yearly sums to become due on such contract, it was error to direct a verdict for the plaintiff."

102 Ga. 594, Mayor & Council of Dawson *v.* Dawson Waterworks Co.

The case thus being reversed and sent back to be retried, the plaintiff on the second trial again introduced the same evidence;

it being agreed that the report of the testimony on the former trial should be offered in lieu of calling witnesses to again testify. (Record p. 418.)

The court again directed a verdict in favor of the plaintiff against the defendant, construing the decision of the Supreme Court as holding that the direction of the verdict on the former trial did not appear to be erroneous for any other reason than that assigned by the court in the opinion above quoted.

The City of Dawson again carried the case by bill of exceptions to the Supreme Court of the State.

The questions dealt with by the Supreme Court of Georgia the second time the case came before that court, and the rulings made, will appear from the opinion of the court in that case, found reported in

106 Ga., pages 696 to 737. City Council of Dawson *vs.* Dawson Waterworks Co

The court in that case have this to say as to the decision rendered by the same court the first time the case was before them :

> "When this case was here before, (102 Ga. 594), it was ruled that, 'This being an action against a municipal corporation for a year's supply of water, in which the plaintiff's right of recovery depended upon the validity of an alleged contract between it and the defendant, covering a period of years, and the evidence not affirmatively disclosing that when the contract was originally made the municipal corporation had, in the manner prescribed by the Constitution of this State, made due and lawful provision for the payment of the yearly sums to become due on such contract, it was error to direct a verdict for the plaintiff.' There is nothing in our present ruling which conflicts with this decision. Upon an investigation of the case as then presented, it was found that one absolutely essential element necessary to constitute a cause of action was wanting, and the case was reversed because the direction of a verdict for the plaintiff was erroneous for that reason. There was no ruling made on any of the questions now decided, although such questions were made in the record. The record in the case did not disclose an ordinance which made provision for the debt, and if all of the other consti-

tutional and statutory requirements had been fulfilled, the absence of this ordinance would have required a reversal of the case. The extent of the ruling in that case was simply that without such an ordinance there could be no cause of action, and whether the other elements necessary to constitute the cause of action were present was not passed upon."

Ib. 106 Ga., page 735.

[Printed Record in this case, pages 491, 492.]

The contention that the city used the water, and therefore should pay for it, the court disposed of by holding that this was a jury question, the court saying: "While the great preponderance of the evidence is in favor of such finding (that is, the finding that the city used the water), there is some evidence upon which a jury could base a finding in favor of the defendant, and we think the case should have been submitted to a jury under proper instruction."

Ib. 106 Ga. page 736 of the opinion.

(Printed Record in this case, page 492.)

This is in keeping with the rule so frequently announced and carried to such extreme lengths in this State, that the court can not direct a verdict where there is any conflict, however slight, and can not even apply to the evidence in determining such question the rules of common sense. If a party makes any contention, however absurd, and goes through the form of offering a witness or witnesses who are permitted to testify on the subject, our State courts hold that the case should be "submitted to a jury under proper instruction." And as to what are "proper instructions," the rule in our State is:

> "It is error for any or either of the judges of the Superior Courts of this State in any case whether civil or criminal or in equity, during its progress, or in his charge to the jury, to express or intimate his opinion as to what has or has not been proved. . . . ." (Code of Georgia, Section 4334.)

The court, therefore, sent the case back to the lower court

to be again tried. There has been no final trial or judgment rendered in the cause. The ruling of the court touching the question raised by the defendant's answer, that the contract for water supply was invalid as creating a debt, is stated in the first syllabus (in our State prepared always by the court) as follows:

> "Without the preliminary sanction of a popular vote as required by the Constitution, a municipal corporation can not contract for a supply of water, on the credit of the city, for a longer period than one year; and a contract which by its terms is to run for twenty years, each year's supply to be paid for semi-annually from year to year, is operative from year to year so long as neither party renounces or repudiates it. Cartersville Improvement Co. *vs.* Cartersville, 89 Ga. 683; Cartersville Water Co. *vs.* Cartersville, 89 Ga. 689; Lewis *vs.* Lofley, 92 Ga. 804; Habersham County *vs.* Porter Mfg. Co., 103 Ga. 613, followed and approved; Spann *vs.* Webster County, 64 Ga. 498; Cabaniss *vs.* Hill, 74 Ga. 845, overruled in part." (Ib. 106 Ga. 696, Syllabus I.)

It will be noted that all of the cases followed and approved are cases decided subsequent to the time that the contract in the present case was entered into and the money expended and the works constructed under the contract, and the bonds, all of them, purchased for value by persons who relied upon the validity of the contract and the good faith of the city in carrying the same out. Two cases, decided before the contract was made and which are in hopeless conflict with the decision now under discussion, are overruled. Another case not referred to in the syllabus, namely: Butts *vs.* Little, 68 Ga. 272, the court disposes of by saying that the case was overruled in Lewis *vs.* Lofley, 92 Ga., 804, decided in 1894, some three years after the contract was entered into. The case of Butts *vs.* Little, 68 Ga., 272, decided in 1881, and which remained unchallenged until after the present contract was entered into, went even further than it is necessary to go in the Dawson Waterworks case in order to uphold that contract. In that case a county entered into a con-

tract to build a court house, to be paid for as the work progressed, less 15 per cent. and the balance at the date when the work was completed. The cost of the court-house, to wit, $24,495.00, was largely in excess of any amount that could be raised by taxation during the year it was to be paid for. The court held that while such obligation, to be paid for in a single year, largely beyond the possible revenues of that year, was illegal, yet "if the parties to this contract can so modify it that the cost of this building can, as it falls due, be met annually hereafter by a levy of one-fifth of 1 per cent. on the assessed value of the taxable property of said county, the injunction ordered may be altered so as to meet this modification."

68 Ga., page 280 of the opinion.

The case of Mayor of Rome *vs.* McWilliams, 67 Ga., 106, the court did not deem necessary to overrule or even to refer to, for the reason that the same was a decision rendered by two judges and not by the full bench of three judges, and under the Georgia law decisions rendered by two judges, while binding as a precedent until some later decision conflicts therewith, yet does not fall within the statute requiring a decision by the full bench to be overruled expressly and not by implication. It will be seen that this last mentioned case not only adopts fully the view subsequently adopted by this court in Walla Walla *vs.* Walla Walla Water Co., 172 U. S., I, but cites in support thereof two cases similar in their facts to the present case. Mr. Justice Speer, speaking for the majority of the court, uses the following language:

> "An obligation arising under a contract on the part of a municipal corporation to pay for work when and as it shall be performed in the future, does not constitute or ripen into an indebtedness within the meaning of the Constitution till at least the performance of the work. 27 Iowa 228; 17 N. Y. 110.
>
> "If this were not so, then it would be impossible, in a majority of instances, to even contract for the most necessary public building without a prior levy and deposit of

money in the treasury. The obligation to pay so far as the time of its inception as between the parties is concerned, is one thing, and an actual indebtedness within the meaning of the constitution is another. I may enter into a contract for an architect to build me a house, but if he never does the work I owe him nothing; so if I pay him as he progresses, I will not be his debtor; so if I contract to pay him when the work is done, I owe him nothing till the contract is fulfilled, and if on its fulfilment I discharge it, I can not be said to have incurred a debt in the sense the Constitution prohibits corporations from incurring." (Quoted in report of Special Master, on page 100 of Printed Record.)

The conclusion finally reached by the Supreme Court in the case of City Council of Dawson *vs.* Dawson Waterworks Company was reached after many fluctuations of opinion, as will be seen by the court from an able review of all of the decisions by the Georgia Court, found in the report of the special master in the present case. (Pages 99, 100, 101, 102, 103 of the Printed Record).

Such wavering of opinion is shown, too, in the manner in which the court dealt with the question in the litigation between the city of Dawson and the Dawson Waterworks Company.

In Dawson Waterworks *vs.* Carver, 95 Ga., 565, being the tax payers' injunction suit above referred to, the court not only were unprepared to rule upon the question, whether the contract was invalid as creating a debt, as contended by the city and its three friendly tax-payers, but in order to reserve the question for future consideration, directs by its judgment that whatever was said by the lower court on the subject should not in anywise bind the parties. When the matter was first before the court, 102 Ga., 594, Mayor and Council of Dawson *vs.* Dawson Waterworks Company, the court again postponed the question, although squarely made, by reversing the case and sending it back by reason of the failure of the record to affirmatively disclose a portion of the contract which the city of Dawson saw fit to omit from the record certified and sent up to that court.

When the case came before the court the last time and was argued in October, 1898, the court was still wavering by reason of the confusion and the hopeless conflict brought about by recent decisions subsequent to the making of the present waterworks contract, and the court subseqently on their own motion directed that the case be reargued, and the decision finally reached, the court frankly say, "is in direct conflict with the decision of the highest court in the land (referring to Walla Walla) as well as with the current of American authority on the subject."

106 Ga., 714.

The court cited as directly in conflict with the conclusion reached by it, decisions of some seventeen courts, embracing nearly every important state in the Union. As tending to sustain its own decision, the court cited four cases, one of them overruled by a later decision of the same court, also cited in opinion, and another, Niles Waterworks vs. City of Niles, 26 N. W., 525; 59 Mich., 311, having been since that decision distinguished and in effect overruled by a later and carefully considered case decided by the same court, namely, Ludington Water Supply Company vs. City of Ludington, 78 N. W., 558; in which the Supreme Court of Michigan places itself fully in line with what is now the almost unbroken current of authority on the subject.

By this decision, a contract believed to be valid by the Waterworks Company, the bondholders, the city and all of its inhabitants alike when entered into, and upon which the company has expended large sums of money in giving the City of Dawson a system of waterworks which had proved altogether satisfactory and unexceptionable, and which was valid tested by what has been held to be the sounder and better view by this court and by the almost unbroken current of authority, the appellant insists, was invalidated and destroyed.

During the time that this litigation was pending between the Dawson Waterworks Company and the City of Dawson, neither

the complainant, the trustee for bondholders, nor any one of the individual bondholders had the slightest notice, information or intimation that there was any trouble of any kind. They rested secure on the rights guaranteed them by the contract and the mortgage which gave them the right to look thereto for their security. They did not know that there was any default by the City in the payment of hydrant rentals. The amount of their interest was paid over to the trustee by the Dawson Waterworks Company, and the bondholders and the trustee for bondholders believed, and had every reason to believe, that the hydrant rentals were, to the extent thereof, the source from which the Waterworks Company met its interest payments on the bonds. The trustee and the bondholders had no notice that the city was using the water and enjoying the fire protection which the contract afforded, while engaged in an effort to escape its liability to pay therefor under the flimsy and fraudulent pretense that there was a distinction between "official" use of the water and the actual use by the fire departments of the city under valid municipal ordinances with the knowledge and approval and active assistance of the city council, with the city's own apparatus furnished for the purpose at each of the numerous fires which occurred during all these years. The trustee had no notice that by such unjust and inequitable conduct the City was engaged in a stubborn and persistent effort to destroy the contract and the property values dependent thereon; an effort which would not by any possibility be successful, except by aid of the pretense that the city was not receiving and using the fire protection which, in fact, all knew it was using and enjoying to the fullest extent possible.

The City knew that the money which created this property and rendered it possible for the city to enjoy the benefits of fire protection and water for the use of its inhabitants was practically every dollar of it derived from the issue and sale of these bonds. It was so contemplated when the contract was entered into. The city actively aided in the sale of these bonds

not only by a provision in the contract that the hydrant rentals might be directly payable to the trustee for bondholders, but by extending the time of beginning the construction of the works for the express and declared purpose of enabling the other contracting party to negotiate and sell the bonds which were to furnish the money to construct the works. The City at the very moment it adopted the ordinance repudiating the contract had the fact immediately before it that "the works can only be disposed of subject to the bonds issued on them, amounting to $40,000.00 at 6 per cent."

The letter from the Dawson Waterworks Company to the mayor of the City of Dawson, pending the negotiations between the city and the Waterworks Company looking to the purchase of the waterworks, which in answer to the City's inquiry as to the probable price, reminded the City that in any purchase, the bonds must be taken care of, and that it was not in the power of the company to dispose of the works except subject to these mortgage bonds to the amount of $40,000.00, was the letter which precipitated the ordinance of June 27, 1894, repudiating the contract. It was because the amount of these bonds exceeded what the City was willing to pay that the City decided to destroy the value of this property, and thus put themselves in a position to purchase it at the City's own price. The ordinance repudiating the contract was adopted at the next meeting of council after that letter was received, and shows by internal evidence that it was based directly thereon. Yet the City, though entering into this course of conduct for the purpose of destroying the contract and the value of this property, which, to an amount greater than what the city regarded as its full value, belonged equitably to the bondholders, gave no notice to the bondholders or their trustee, but withheld from them all knowledge of the litigation intended to destroy their security. The name and residence of the trustee was known to the City. The mortgage was spread upon the public records in the City. The president of the trustee company, before his company would accept the trust, came personally to

Dawson and was shown the waterworks and the City by the mayor and council in a body, and every inducement offered that it was in the city's power to offer to cause his company to recommend and handle the bonds and place the same with its customers and clients.

The taxpayers' bill for injunction, which, it is admitted, was instigated by the City, prepared at the direction of the mayor and city council, by the salaried city attorney, by which it was sought to have the contract declared invalid, did not name the trustee for bondholders defendant, although the prime object of the suit was to destroy their security and their property. The trustee was given no notice of the suit. It was the City's purpose to destroy their rights clandestinely and without their knowledge.

The stock ownership of the Dawson Waterworks Company is held by the American Pipe Manufacturing Company. This last named company builds waterworks and controls by stock ownership a large number of waterworks companies, having contracts with municipal corporations to supply water for public purposes. For the cost of construction, the Waterworks Company in each instance issues its bonds, secured by mortgage similar to that in the case at bar. It is from the sale of such bonds that the pipe company realizes the money used by it to construct works under its contract with the Waterworks Company, or proposed Waterworks Company, or more usual, to reimburse itself for the money already advanced by it for the purpose under an agreement with the Waterworks Company that such bonds are to be issued therefor. It has sold in this way several millions of dollars of bonds of different companies which are outstanding. Several of these Waterworks Companies are located in Georgia.

When this trouble arose between the City of Dawson and the Dawson Waterworks Company, the pipe company, for business reasons, desired that the bondholders be not needlessly disturbed, and being led to believe that the contract would be finally upheld, it loaned to the Dawson Waterworks Company

from time to time the money wherewith to meet the interest falling due on the bonds. Whether or not, in strict ethics, the company was justified in this withholding from the trustee for the bondholders and the owners of the bonds knowledge of the City's conduct in repudiating the contract, it was not an unnatural course for the company to adopt from a business point of view. The Pipe Company, no doubt, supposed that it was justified in adopting this course, as any other course would have disquieted not only the owners of the bonds of the Dawson Waterworks Company, but bondholders in each of the other companies that have contracts with municipal corporations in Georgia.

The motives, however, of the Pipe Company or of the Waterworks Company are not material. The holders of the bonds purchased them for value in open market, or inherited them from persons who thus purchased. Neither they nor their trustee have any connection whatever with the Waterworks Company, or the Pipe Company, except as creditors of the first named company by reason of holding the bonds. These facts are clearly shown and are uncontroverted.

The decision of the Supreme Court in the case of City Council of Dawson *vs.* Dawson Waterworks Company, 106 Ga., 696, above referred to, was rendered March 14, 1899. The City of Dawson, upon the handing down of that decision, proceeded to carry into effect its purpose of constructing an independent system of waterworks of its own. This purpose had been formed as far back as 1894, and at an election held December 12, 1894, the voters had authorized an issue of bonds for that purpose. It was, however, promised the voters that the bonds would not be sold and the money expended till a decision could be had upon the validity of the Dawson Waterworks contract and the sale of the municipal bonds was held in abeyance pending the aforesaid litigation between the Waterworks Company and the City. The decision of the Supreme Court of Georgia being regarded by the City as a final decision of the question, the City at once entered into negotiations for the sale of its

bonds and was preparing at once to erect a system of waterworks.

As a matter of fact, the decision of the Supreme Court of Georgia, 106 Ga. 696, *supra,* was not a final determination of the question. The effect of the decision was merely to send the case back to be again tried in the lower court. Under the liberal laws in Georgia allowing amendments at any time before the jury actually retire to their rooms on the last trial, the plaintiff, the Dawson Waterworks Company, could on the subsequent trial of the case have amended its declaration and set up the contention that the waterworks contract with the City of Dawson of February 21, 1891, was, according to the State of the decisions at the time it was rendered, valid and that the subsequent ordinances of the City of Dawson were laws of the City seeking to impair the obligation of the contract, and thereby present a federal question and had the court pass upon the same; and if the decision upon the federal question when so presented had been adverse to the contention of the Waterworks Company, the case could have been brought by writ of error to this court. There was, therefore, no final decision of the matter, and there has not been any further trial or final decision in that case up to the present time.

It was, however, such a decision as satisfied the voters and inhabitants of the town of Dawson and such as they were willing to act upon in incurring the expense of erecting waterworks under municipal ownership. The aforesaid case between the Waterworks company and the City of Dawson was an action at law in the Superior Court which holds only two sessions a year. In the due course of things, it would have been impossible to have brought the question again before the Supreme Court of Georgia in less than a year, and a writ of error to this court would have taken proportionately longer. Meantime, the City would have erected its own waterworks and the irreparable damage complained of in the present bill would have been already done.

The situation presented additional difficulties. The City

having repudiated the contract, issued executions for City taxes and has placed the same in the hands of the city marshal for levy and sale of the waterworks property in disregard of the provision in the contract that the furnishing of water for the municipal buildings and public fountains should be accepted by the City as payment of taxes. And at a time when the city had invoked a decision which destroyed the credit of the Waterworks Company and largely impaired the value of its property, its property was to be levied upon and sold under municipal tax execution. A part of the taxes was levied to provide a sinking fund and interest on the municipal bonds for the erection of a rival system. As already stated, the City owed the Waterworks Company for hydrant rentals for the years 1895, 1896, 1897 and 1898, besides the portion of the hydrant rentals for the year 1894 retained by the City under its claim for back taxes, making a total of some $8,600.00, besides interest. To make good this loss of revenue and enable the Waterworks Company to meet the interest on its bonds, the American Pipe Manufacturing Company loaned to the Waterworks Company from time to time its own funds for the purpose of meeting this interest, the amounts so loaned, as shown by the evidence, up to and including March 1, 1899, amounting in the aggregate to $8,560.00. (Finding of Master, pages 93, 94 of Printed Record.) The business reasons which induced the pipe company to make these loans have been already stated.

After the decision was rendered by the Supreme Court of Georgia in the Dawson Waterworks case, 106 Ga. 696, *supra*, declaring contracts of this character invalid, the pipe company were unwilling to make further loans to the Waterworks Compay. The company was, therefore, left in a position where it was wholly unable to raise necessary funds for the payment of future instalments of interest to the bondholders, or for other necessary purposes. Its most valuable asset, namely, its contract with the City of Dawson, was wholly discredited and, for the time being at least, destroyed. The proposed competition on the part of the city, a field in which as this court well said in

the Walla Walla case, it undoubtedly would have become the master, would inevitably destroy the value of the waterworks plant, except as the material could be removed and parts sold in a dismantled condition.

At this juncture, therefore, the Waterworks Company conceived it to be its duty to apprise the trustee for the bondholders of the true situation of affairs, and do all in its power to put the trustee in a position to protect the rights and interests of the bondholders. The hydrant rentals due from the City of Dawson for fire protection for the years 1896, 1897, 1898, (being every year except the year 1895, for which the aforesaid action at law was still pending), the trustee was by resolution authorized to demand and collect, in order to reduce the mortgage debt in view of the impairment of the security, or as it was called, in order to provide a sinking fund. The contract with the city made these hydrant rentals payable either to the Waterworks Company, or "to such trust company as the Dawson Waterworks Company may elect or decide upon as the trustee for their bonds." The mortgage in express terms embraced these hydrant rentals primarily for the payment of interest on bonds, but also in express terms as security for the principal of the debt. There had been no default in the payment of interest, but a condition of affairs had come about which left the security which originally was deemed sufficient no longer sufficient for the protection of the bondholders and requiring immediate action for their protection against its further impairment. The company, therefore, authorized the trustee to take such immediate steps as might be deemed necessary That a mortgagor may before default, turn the mortgaged property, or any portion of it, over to the mortgagee for his protection, would seem to admit of no doubt; that ~~its~~ common honesty and fairness would impel the Waterworks Company to do exactly what it did do, all must concede. It is difficult to see how the city could find in this action any cause of complaint. We submit, however, that the equity of the trustee in the situation

was complete and perfect without regard to any action taken by the Waterworks Company.

The trustee for the bondholders, upon being apprised of the situation, brought the present bill.

The bill was filed on May 1, 1899, by appellee, the Columbia Avenue Savings Fund, Safe Deposit Title & Trust Company, as trustee for the bondholders, against the City of Dawson, certain individuals in their representative capacity as officials of said city, and against the Dawson Waterworks Company. The bill alleged in substance:

The Water Company on September 1, 1891, created the complainant trustee for eighty of its first mortgage bonds in the denomination of $500.00 each, and executed to complainant its mortgage or deed of trust, having as security for the payment of its said bonds all of its real and personal property, rights, franchises, privileges and appurtenances, together with all incomes, rents, benefits, issues and profits then or thereafter payable to the company and in particular its rights under the contract with the City of Dawson, and the income payable to the said company, or to the trustee for its bondholders by virtue of the contract with the City of Dawson in that regard.

The bonds are described, and a copy of the mortgage is to the bill attached. The bonds were duly issued and sold in open market to *bona fide* purchasers for value. They were issued and sold in order to procure the money with which to construct and equip the system of waterworks as contemplated in the aforesaid contract between the City of Dawson and the Dawson Waterworks Company.

The contract as contained in the aforesaid ordinance of February 21, 1891, is described and set forth in the bill, and a copy is attached to the bill as an exhibit. The terms of the contract have been hereinbefore set forth, and it is not deemed necessary to repeat the same at this point.

The bill set forth the circumstances which led up to the

making of the contract between the City of Dawson and R. L. Bennett, above referrred to, including the election of June 11, 1886, and the careful investigation into the question of what was the most feasible plan of carrying out the wishes expressed by the voters, and that the present contract was the result; that the contract was published in full in the public gazette, and was acquiesced in by all the citizens. The works were constructed at an approximate cost of $40,000.00 and was a complete and thorough system of waterworks in accordance with the specifications and requirements of the contract. The Dawson Waterworks Company was duly incorporated for the purpose of carrying out the contract. The system was fairly and fully tested by the City and was found to satisfactorily comply with all the requirements of the contract. The city council of Dawson on August 12, 1891, adopted a resolution declaring that after fully testing the system, it was accepted by the city as fully complying with the contract. The Waterworks Company continued to maintain and operate its system in full compliance with the requirements of the contract, and the city has continuously enjoyed the fire protection contracted for and for that purpose has continuously used water furnished by the Waterworks Company so often as required. It was understood and contemplated by the City at the time of entering into the contract that the money required to construct the system of waterworks was to be procured by the issuance and sale of the bonds of the Waferworks Company, and in order to render the bonds more salable, the City by said contract agreed and promised to pay to the trustee for the bondholders annual rentals stipulated in the contract, thus notifying investors to become purchasers of the bonds upon the faith that the City would observe its obligations as therein contained. The bonds were negotiated and sold upon the faith that the City would pay said rentals to be applied to the liquidation of the principal and interest of said bonds, and the proceeds of said bonds were used in construction of said waterworks system.

After using the water without objection or complaint, the city council on June 27, 1894, adopted the resolution hereinbefore set out, declining to further carry out its contract with the Waterworks Company. The Waterworks Company had in no way failed to comply with its contract, nor had any complaint been made as to the character of the service, the pressure, or the quality of the water furnished. At the time of the passage of the resolution, the City was considering the question of purchasing the waterworks plant of the Dawson Waterworks Company, and the bill charges that the purpose of the City in repudiating the contract was to destroy the value of the property by withdrawing the revenues necessary to its existence, and thus force the company to sell at such price as would be satisfactory to the City.

The bill sets forth the bringing, by the City's procurement, of the taxpayers' bill for injunction above referred to; gives its history; sets forth the City's subsequent conduct; its notice in December, 1894, that the city would not be liable on the contract after January 1, 1895, and the Waterworks Company's reply declining to acquiesce in the repudiation of the contract by the City, and giving notice that it would continue to furnish water with the required pressure for the use of the City for fire protection; that the Waterworks Company has since that time furnished the service contracted for and carried out the contract on its part.

The bill sets forth the provisions of the contract with reference to the payment of municipal taxes by water service furnished and that the company has at all times held itself in readiness to furnish the water contracted to be supplied in lieu of City taxes, notwithstanding which the City has assessed, levied and attempted to collect such taxes, and an execution has been issued and placed in the hands of the city marshal for the collection thereof by seizure and sale of the Waterworks Company's property.

The bill sets forth the holding of the election on December 12, 1894, to determine whether the city should issue bonds to

erect or buy waterworks and electric light plant for the City; the result of the election; that $10,000.00 of the amount so authorized have been issued and sold and with the proceeds the city has erected an electric light plant; that the remainder amounting to $25,000.00, has not been sold, but were held by the City under its purpose to first invoke a ruling of the court, whether or not its contract with the Waterworks Company was binding. It is charged that it was the plan and purpose of the City while intending to repudiate its aforesaid contract, nevertheless to continue to use the water and enjoy the fire protection thereby afforded till such time as suited its convenience to sell its bonds and erect its own waterworks. The Supreme Court of Georgia having decided that the contract created a debt such as was forbidden by the State Constitution, the City of Dawson engaged in an effort to procure a sale thereof for the purpose of erecting a system of waterworks in violation of its aforesaid contract and in total destruction of the property which forms the security of the holders of the bonds. The bill sets forth that notwithstanding the City's pretended rejection of the contract, it has continued to use the water at all times in pursuance of its scheme and intention to receive the benefits, though declining to carry out the obligations of the contract, and pretending not to use the water which it was so using. The public ordinances of the City providing for the use of the water by the fire department of the City were never repealed; the fire companies were not notified that they were no longer to use it, or forbidden its use; no other source was provided by the City; hose and other apparatus were furnished them by the City wherewith to use the water, and the persons composing the fire companies were given tax exemptions by the City in consideration of their services in putting out fires with the water furnished for the purpose by the Waterworks Company under the contract; that the mayor and council were present at the various fires and saw the water so used, and that it was their purpose that it should be so used, and that they assisted in its use; that the mayor, who, in December, 1894, addressed the notice to the

Waterworks Company that the City would no longer use the water, a few weeks thereafter, being still mayor and still engaged in carrying out and effectuating as mayor the City's purpose of repudiating its contract, assisted with his own hands in turning the water on a burning building and thereby putting out the fire and protecting the adjacent buildings against the spread of conflagration.

The bill narrates the City's conduct in carrying out its purpose to destroy the contract, and the value of the property which forms the security of the bondholders. The Waterworks Company has no property save its waterworks plant, which derives its value from its contract with the City of Dawson and the rights secured by said contract. Other than from these sources, it has no means with which to pay the operating expenses and the interest and principal of the bonds. The abrogation of its contract with the City would result in the almost complete destruction of the value of the property of the Waterworks Company. If the City of Dawson should be permitted to erect and operate its own system of waterworks, the company would be in no position to compete successfully for the patronage of private consumers. The Waterworks Company, recognizing the right of the complainant to demand and receive the rental due, and to become due under its contract with the City, in order to protect the rights of the bondholders, has yielded to complainant's demand, that complainant shall in future have the exclusive right to collect from the City of Dawson all rentals accruing under the contract for the year 1896 and subsequent thereto, of which the city has been duly notified, and payment of rentals has been demanded. The bonds issued by the Waterworks Company were in the first instance sold by the American Pipe Manufacturing Company, a New Jersey corporation. The latter company sold all of its bonds in open market for value, and the same are now owned by a number of different persons.

The pipe company is largely engaged in the construction of waterworks and has frequent occasion to negotiate and sell

the bonds of such companies, and in a business way is interested in upholding the commercial value of such securities. The Pipe Company, in order to save the waterworks plant from foreclosure and sale, paid the interest falling due on the bonds up to and including that due March 1, 1899. Under an agreement with the Waterworks Company, as complainant was informed, the Pipe Company should be subrogated to the rights and remedies of the original holders of the interest coupons.

As part of the relief originally prayed, the bill asks that the moneys thus expended may be repaid if there should come into complainant's hands a surplus sufficient for the purpose, over and above the payment of accruing interest on the bonds and the creation of a sinking fund to be used in the discharge of the principal of the bonds. The bill prayed for appropriate equitable relief. Amongst other prayers, is a prayer for an injunction against the City of Dawson, restraining the erection, installation, or operation of any system of waterworks in and for said city, and from entering into any contract with any other person for the construction, operation, or use of any system of waterworks, or for the supply of water for fire protection in violation of the aforesaid contract with the City of Dawson, and from issuing or disposing of bonds, or paying out money, or incurring obligations, or entering into or carrying out any contract for the corporation of a system of waterworks other than that existing with the Dawson Waterworks Company.

It is further prayed that the sanctity and the integrity of the contract between the City of Dawson and the Dawson Waterworks Company be kept intact, and that said contract be decreed to be valid and mutually binding upon the parties thereto; that the said contract be required to be specifically enforced; that the complainant may recover from the City in trust for the benefit and use of the bondholders, the rentals due by the City for the use of the water for the year 1896, and the succeeding years, and for general relief.

The bill, it will be seen, is between a corporation of the city of Philadelphia, as complainant, and a Georgia Municipal corporation, the Dawson Waterworks Company, a Georgia corporation, and certain individuals, citizens and residents of Georgia, as defendants. It, therefore, would seem that the court has jurisdiction on the ground of diversity of citizenship, as the relief to which the complainant was entitled necessitated the joining of the several persons named as defendants, in order that such relief might be effectual and complete; that the right thereto was original and primary, and ought not to be defeated because on some of the questions the Waterworks Company might also be benefited by the relief.

Upon this bill a rule *nisi* was duly issued and served, and a temporary restraining order was granted.

On June 26, 1899, prior to the hearing of the rule *nisi*, complainant, by leave of the court, amended its bill of complaint, setting up more explicitly that the ordinance of the City of Dawson repudiating its contract, was an attempt to impair the obligation of the contract and destroy the value of the property which formed the basis of the bondholders' security in violation of the constitution of the United States; that the ordinance of the City ordering an election for December 12, 1894, to determine whether the City should issue bonds for the purpose of erecting a system of waterworks and an electric light plant, and the act of the voters of the town at such election, in rendering the ordinance of the city council effective, and the ordinance declaring the result of the election so held, and the refusal of the city to levy a tax for the purpose of paying the taxes due the Waterworks Company, are all and singular laws in impairment of the obligations of the contract between the City of Dawson and the Dawson Waterworks Company, and in violation of the Constitution of the United States, and in destruction of the rights of bondholders in said contract and in the property which derives its value from the existence and obligations of said contract.

In the amendment it is further alleged that such ordinances and conduct on the part of the city, if given effect, will deprive the holders of the bonds of the Waterworks Company of their property without due process of law in violation of the federal statute. The amendment with greater detail and more specifically than it is here stated, sets forth that the various ordinances and acts of the city, complained of, were in violation of and an impairment of the contract clause of the United States Constitution, and jurisdiction was distinctly predicated on that ground.

The City of Dawson and the mayor and members of council, in answer to the rule, interposed a pleading denominated "Showing for Cause," and consisting in part of objections to the jurisdiction and in part of denials and averments "by way of answer to the allegations in said bill." This answer is exceedingly sweeping in its denials. It starts off by denying "each and every allegation in said bill, except as may be expressly admitted," and defendants having averred everything in the bill to be untrue, except as expressly admitted, carefully admit nothing but such facts as they conceive to be good matters of defense, and they demand "full and strict proof" of everything of any importance. These sweeping denials are supported by the oath of the mayor, all the aldermen and the city marshal. They deny that complainant is a corporation, that a mortgage was executed, that there was a trustee or bonds or bondholders, or that any money was raised by the sale of bonds, or that the City contemplated that money was to be so raised; deny that the City used the water, and in the same answer deny that at various times when it was used it was of requisite and sufficient pressure as required by the contract. The defense chiefly relied upon was the contention that the contract between the City and the Waterworks Company was void under the Constitution of the State of Georgia, and had been so declared by the Supreme Court of the State of Georgia in the case of the City of Dawson *vs.* Dawson Waterworks Company, 106 Ga. 696.

The cause came on to be heard under the rule before Circuit Judge Pardee. Various affidavits were submitted. The facts as developed were such as are hereinbefore set forth. The City by its affidavits sought to show that the system was not kept in repair, that the water was allowed to run down in the stand pipe, that the requisite pressure was at several fires mentioned insufficient.

The complainant, in rebuttal, introduced a large number of affidavits from persons most active and of greatest experience in the work of fighting flames, showing that such failures as occurred were not in fairness to be charged up to the score of the Waterworks Company, but were due to other causes. This feature of the case will be discussed further on. It may be useful, however, to mention at this point the following facts, established both by the affidavits at the preliminary hearing and by the testimony of the witnesses on the hearing before the Master:

1. The contract requirements and specifications are such as to get a good and efficient system of waterworks, fully up to the needs of a town the size of Dawson.

2. The system, when completed, was fairly tested and found to be up to the contract requirements. From the completion of the system, August 12, 1891, to June 27, 1894, the date of the ordinance repudiating the contract, the water had been used at a number of fires and at all was entirely satisfactory. After June 27, 1894, the water continued to be used at all fires for more than two years without complaint. The first fire as to which any complaint is made as to the pressure was a fire which occurred July 28, 1896. It was shown by the uncontradicted testimony that at this fire the water was only half turned on, a fact only discovered at the end of the fire. (Affidavit of B. R. Fussell). With this exception, there was no fire at which there was a lack of pressure or complaint on that ground, till a fire, known as the Green & Whitehard fire, which occurred June 11, 1897. And nearly all of the fires as to which there is any alleged insufficiency of pressure occurred, ~~the twelve,~~

between that date and the summer of 1898, most of them in the driest part of the summer; that they were in the main at the weakest part of the system, that the fire companies were badly disorganized; the hose, most of it, old and defective; long lines of hose were employed leading to great loss of pressure; and that there was a general want of efficiency and intelligence in handling the hose and fighting the fire.

The record of the testimony offered upon both trials of the case of the Dawson Waterworks Company against the City of Dawson in Terrell Superior Court, hereinbefore referred to, is in the record. (Printed Record, page 416 to 449.) It appears that at the first trial which took place the latter part of November, 1896, no evidence was offered of any failure of pressure. At the second trial which occurred in July, 1898, it was proposed by the defendant to show that at a fire which occurred in 1897, at a particular hydrant, the system would not throw a stream of water fifty feet high. No complaint was ever made at any time to the Waterworks Company of any insufficiency of pressure and no request for a strengthening of the system or any part of it.

The water was used at all the fires which occurred, and was of the most incalculable benefit to the city and its inhabitants in protecting their property from fire. At one of these, the Farnum House fire, which occurred April 14, 1898, the entire business portion of the town was thereby saved after the fire had gained such headway that destruction seemed inevitable; the amount saved from destruction by the use of the water at that one fire amounted to several hundred thousand dollars, according to the best estimates obtainable.

The evidence seemed to establish clearly that such failures as resulted were due, at least chiefly, to causes for which the waterworks were in no wise responsible, having occurred at a time when the city had permitted its fire department to reach the stage of greatest inefficiency in its effort to support the contention that the action of the fire department was not "official;" the affidavits establish that at all these fires very long lines

of hose were used, and the friction loss from this source was largely increased by the fact that the hose used was largely old, leaky, and in bad condition. The number of hose lines employed, and the length of lines, were beyond the pressure capacity of the smaller mains.

There was no system of inspecting hose, and rejecting such as was bad; no drilled, trained firemen; no intelligent head to direct operations; no proper regard to the capacity of mains, or laws of friction losses; no attempt in any case to counteract friction loss incident to long lines of hose by uniting two or more into one by twin coupling at a point near the fire, so as to give a good strong stream. These facts are sufficient to fully explain all the failures and shortcomings at all the fires where the results were unsatisfactory.

These alleged failures, however, occurred at a time when the City of Dawson owed for water rentals an amount varying from about $8,000 at the beginning to $12,000 at the close.

The city had grown in certain directions, leading to an increased consumption of water in certain quarters, and the consequent diminution of the pressure in certain portions of the system. The contemplated extensions the Waterworks Company had not been able to make by reason of the City's action in thus cutting off its revenues.

No notice of any complaint of any character had ever come to the trustee or the bondholders until the coming in of the defendant's answer to the Rule. While these complaints were believed to be due at least in chief part to the inflamed state of mind into which many good people had been wrought up by the long and bitter fight which the City had waged against the Waterworks Company, yet the trustee representing the bondholders, and carrying out their wishes, determined to make such extensive improvements as could not fail to meet the wishes and requirements of the people of Dawson.

In the amendment, above referred to, which was prepared and allowed after the coming in of the defendant's answer to the rule and affidavits, the complainant enlarged the scope of

the original bill by adding thereto the following: (Record pp. 38 and 39):

> Your orator is informed and charges the fact to be that, prior to said decision rendered last March, the Dawson Waterworks Company had already planned and arranged to make extensive repairs and improvements of its plant, which would very materially better the service and increase the water pressure and height and strength of fire streams afforded by said system; but in its present financial condition, with its revenues cut off, and its very existence threatened by the proposed opposition system, said Waterworks Company is not in a condition to float betterment bonds, or borrow money to make said proposed improvements and repairs, and has withdrawn the contract for making the same. Your orator never heard of any complaints as to said waterworks, or the character of the service, until the filing of the defense in this present case, and from an investigation is led to believe that if any cause for just complaint exists, it exists very slightly, and in the present unfortunate attitude of said city has been greatly and unjustly exaggerated. Yet your orator recognizes that said complaints, even though unfounded, work great financial injury to the revenues of said company, and its property, and your orator recognizes that while repairs are perhaps not urgently needed at this time, yet it will be necessary in future to make repairs and extensions in said system from time to time during the lifetime of said contract. The said Waterworks Company can not, in the present condition of affairs, make such repairs and improvements; unless the same are made as they become necessary, the bondholders will lose revenue as well as the property which constitutes their security.
>
> Your orator prays that this Honorable Court will direct that the rentals owing by said City of Dawson may be paid out, as they are collected, in making such repairs, betterments and extensions of said system as the due protection of the rights and interests of bondholders may require, and that if need be, certificates of indebtedness against said plant and its revenue be authorized by this Honorable Court so as to make such repairs and improvements as may be necessary before said rentals can be collected, and that

> the Dawson Waterworks Company be required on its part to specifically perform all its obligations under said contract, and continue to furnish such service as the contract calls for, and that the benefit of said contract may be preserved, and that thereby the rights of bondholders may be protected and saved."

The offer thus made was made in good faith, and was carried out as early as was practicable by the erection of a new stand-pipe, having twice the capacity of that called for in the contract and forty feet higher, and capable of giving an amount of pressure in every part of the system considerably in excess of the contract requirements. This new stand-pipe was erected at a cost of $7,000, although the city at the time was indebted for hydrant rentals in the sum of $13,000, and was still making every effort in its power to break the contract, and render this large investment valueless. As shown by the uncontradicted testimony, furnished in large part by the defendant's own witnesses, there has never on any occasion been any failure of pressure during the four years since the new stand-pipe was erected.

> "The cause came on to be heard under the rule before Circuit Judge Pardee, whereupon the court, after considering the evidence and the argument of counsel granted on September 16, 1899, an order for injunction *pendente lite* as prayed in the bill, and further ordered that the defendants might apply to the court at any time after thirty days from the date of the order for a test of the ability of the Dawson Waterworks Company to perform its obligations in regard to the furnishing of the water to the City of Dawson for municipal purposes and fire protection, according to the letter and spirit of its contract; and upon such application the court would order a test and trial of the same by experts, under the direction of a Master, and take such action upon the Master's report as equity might require. The injunction as ordered was duly issued."
>
> (Master's Report, Record p. 82.)

The defendant never applied for a test and trial of the sufficiency of the system and the service furnished as it was provided by this order the city might do.

The further history of the case may also be stated in the language used by the Master in his finding:

> "From this order granting an interlocutory injunction, an appeal was duly prosecuted to the Circuit Court of Appeals. That court dismissed the appeal without considering the merits of the controversy, upon the ground that an appeal will not lie to a Circuit Court from an order granting an interlocutory injunction in a case involving the construction and application of the Constitution of the United States. (City of Dawson *vs.* Columbia Avenue &c Co., 102 Federal 200.)
>
> To the original bill the defendant City of Dawson demurred for want of jurisdiction in the court, on the ground that after arranging the parties according to interest, the requisite diversity of citizenship did not exist, and on the further ground that no Federal question was involved. The defendant also demurred to the bill for want of equity, on the ground of an adequate remedy at law. After argument of counsel the demurrer was over-ruled on July 8, 1901, 'the court considering the law and equity to be with the complainant and the demurrer to said bill not well taken.' "
>
> (Record page 82.)

Thereafter, on the 3rd day of August, 1901, the City of Dawson, and the defendants who were being sued in their representative capacity as officers of said city, filed their answer to the bill as amended.

This answer was likewise sweeping in its denials. The mayor, the city marshall, and every member of council support by their oath all the sweeping denials of this answer. The answer declares:

(Record page 42.)

> "The said defendants do now say, that they deny each and every allegation contained in said bill, except as may be expressly admitted, and demand full and legal proof

> of the same so far as it may be proper and competent to make such proof. They do not admit that complainant is an existing corporation as alleged."

The answer then proceeds, either directly by express words of denial, or indirectly by the use of the words, "do not admit or deny" the execution of the mortgage, although the original, duly executed had already been put in evidence; also the existence of the bonds, and the appointment of the trustee. The answer expressly denies the sale of the bonds, and the advance of the money on the bonds. The answer denies that complainant is a corporation, and contains numerous other similar denials of facts which had been positively proved on the hearing of the rule. The original answer to the rule had alleged that the works did not furnish the required amount of pressure, and that the system had not been kept in proper condition for the prompt and effectual use in extinguishing fires. There was no complaint in that answer as to the purity or wholesomeness of the water, or its fitness for domestic use. The trustee for the bondholders, wishing to remove the complaints made by the answer to the rule, erected a new and larger stand-pipe forty feet higher than the old stand-pipe, and affording a pressure which was at all times in excess of the contract requirement. This was done at an expense of $7,000. The trustee hoped that this liberal expenditure would remove all past dissatisfaction. In the latter answer, however, the City adds to its former complaint the following: (p. 70.)

> And these defendants further answering all of the allegations in said bill to the effect that the Dawson Waterworks Company had fully performed its contract, do now deny said allegations and do say in addition to what has already been set forth in this answer on that subject, that the water furnished by said company as referred to in said allegations was not only inadequate for protection against fire but impure and unwholesome and unfit for domestic use and sanitary and other useful purposes.
>
> They further say that at times said water was so muddy that it was not only unfit to drink but was unfit for bath-

> ing purposes, and that on one occasion when said water was sought to be used to extinguish fire in Baldwin's lumber yard on or about the 28th of July, 1896, the said water was so thick with mud that for some time the same could not be used for said purpose, the delay being very disastrous so far as said fire was concerned." (Record p. 70.)

This complaint is thus urged for the first time after litigation in different forms, for the purpose of breaking this contract, had been going on for upwards of seven years, and after the trustee for the bondholders had expended $7,000 in removing every complaint that the city up to that time had thought fit to make. The source of supply was selected by the City, and by unanimous resolution of the Mayor and Council had been declared to be acceptable as a supply before the American Pipe Manufacturing Company purchased Bennett's franchise and undertook to construct the works. The so-called muddiness was simply the slight color of turbidity which existed when the water was accepted, and which is pointed out in the analysis upon which the city's acceptance was based. In that analysis the water is described as follows: (Record p. 311.)

> "Faintly turbid; slightly colored by vegetable matter in solution. Slightly organic sediment on standing. Organic impurity slight and entirely unobjectionable. A pure, safe water."

It was disclosed by cross-examination of the city's witnesses that shortly before the trial an analysis of the water had been made at the instance of the city, and that the city did not see fit to offer this analysis in evidence, or to apprise the court of the result. No expert testimony as to the quality of the water was introduced except the analysis of the State Chemist above referred to. The Master found as follows: (Record p. 91:)

> The General Assembly of the State of Georgia passed an Act, approved September 7, 1891, for the protection of the water supply of the waterworks of the City of Dawson. By this act it was made unlawful to obstruct or

interfere with the flow of the stream, or pollute or contaminate in any way or by any means the water of the stream or watershed, so as to affect in any degree the quality or purity of the water. It was made unlawful to place or deposit any dead animal or vegetable matter in the swamp bordering on and surrounding the stream, its springs and branches, so as to affect the purity and quality of the water. The violation of these provisions was declared to be a misdemeanor. The police supervision of the marshal and policemen of the City of Dawson was extended over the water-shed, and the officers were empowered to make arrests therein for violation of the provisions of the act. The ordinance of the City of Dawson made it the duty of the mayor to appoint three members of the council, whose duty it should be to superintend the waterworks and water supply of the city, and to see that the owners of the Waterworks Company complied with their obligations in furnishing water to said City and private individuals.

(City Code, paragraph 242.)
(Record page 91.)

No complaint had ever been made by the city as to the quality of the water either to the Waterworks Company or the trustee for the bondholders. No request was made that anything be done by the water company to protect the water or the watershed.

It has always been the policy of the Waterworks Company to listen to and remove all reasonable complaints. The general superintendent of the company has so stated to the Mayor and members of Council on a number of occasions. The test authorized by the order of the Circuit Court granting the injunction *pendente lite* applied to the quality of the water as regards purity and wholesomeness as well as every other feature of the contract. The complainant has stood ready at all times to have such test made if the city desired it.

To this answer a replication was duly filed, and at this stage of the case reference was made to the Master. (Record p. 85.)

By order of reference all issues and questions of law and of

fact were referred, the order of reference being as follows: (Record p. 75:)

> "This cause coming on to be heard upon the application of complainant for reference thereof, and it appearing to the court that the said cause is at issue upon the complainant's bill of complaint, and the amendment thereto, and the defendants' answers to said bill and amendment and the general replication filed by the complainant to said answers, and it appearing that a reference of said cause should be had for taking of proofs, touching the matters in issue, and to ascertain and report upon the several matters and questions in issue in said cause, it is now here ordered that the said cause be and the same is hereby referred to Wm. A. Wimbish, a standing Master of this court, and he is hereby made a Master in said cause and directed to take proofs on all and singular the issues herein, and to ascertain and report touching all matters in issue in said cause, and he is authorized to discharge his duties as such master at any convenient place, as he may be advised, outside of, as may be agreed, as well as within, the said district.
>
> In Open Court this 2nd day of December, 1901.
>
> WM. T. NEWMAN,
> United States Judge.
>
> We consent.
> LAING, GUERRY & HALL,
> Solicitors for Defendants.

The evidence was fully taken and after lengthy oral arguments, and the filing of elaborate briefs, the Master submitted an able and learned report. The Master had the matter under consideration nearly a year, and the report bears evidence of the most careful and patient examination of the voluminous evidence in the case. An examination of the full evidence will show that every finding of fact is fully sustained by the proof. The exceptions present detached and fragmentary excerpts from the testimony of the various witnesses, omitting the qual-

ifications which some witnesses made in other portions of their testimony, and omitting all reference to other testimony, the evidence in the case conflicting in many instances. These exceptions were considered by the Master, who heard suggestions of counsel and argument thereon, after submitting to counsel his draft report and before finally adopting and filing the same. The exceptions were also fully and carefully considered by the Circuit Court, who held the matter under consideration several weeks before reaching his conclusion. The final decree, rendered August 3, 1903, sustains the findings of the Master.

ARGUMENT.

I.

The appellant challenges the jurisdiction of the court as a court of the United States, and also the court's equitable jurisdiction as a court of equity.

Jurisdiction is predicated both upon diversity of citizenship and the existence of a federal question. The grounds upon which equity jurisdiction is invoked are set forth later on in the brief.

II.

The complainant is a Pennsylvania corporation. The bondholders, in whose behalf the suit is brought, are all of them citizens and residents of States other than the State of Georgia, though this last mentioned fact is not deemed material, the bondholders not being themselves parties and the right of action being in the complainant as their trustee. The defendants are the City of Dawson, a Georgia municipal corporation, the Dawson Waterworks Company, a Georgia corporation, and certain individuals all of whom are citizens and residents of Georgia.

The contention of the appellant is expressed in the thirteenth assignment of error, as follows:

> "13. The court erred in granting said decree for said injunction, because under the averments of said bill as amended, the court had no jurisdiction of the cause, it appearing that the Dawson Waterworks Company should have been party plaintiff, if any lawful party at all, and not defendant; was a corporation created by the State of Georgia having its only existence and domicile therein, and in said district, all of these defendants being likewise resident in said State and district." (Record, page 178.)

In the specifications of error in appellant's brief, this same ground is differently stated, as follows:

"The court erred first in not dismissing complainant's bill for want of jurisdiction, because under the pleadings there was no diversity of citizenship, the water company, the real complainant, and the city, the defendant, both being Georgia corporations, the assignment of the cause of action to nominal complainant being fictitious, merely colorable, and without interest, and for the purpose of conferring Federal jurisdiction." (Appellant's Brief, page 23.)

It is urged on behalf of appellant that, ~~inasmuch as~~ the fact that the Dawson Waterworks Company may, in some part of the relief sought, have an interest in the question which may be advanced rather than injuriously affected by the success of the complainant's bill, makes the Dawson Waterworks Company a necessary party plaintiff and the joinder of that company as defendant an improper or collusive joinder of parties for the purpose of creating a case cognizable in the United States Courts. It is, of course, a familiar rule, reinforced by Act of Congress, that the court will not permit an ingenious or capricious arrangement of parties, or the setting of parties on the wrong side of the docket, where it is plain they do not properly belong and would not have been placed except for purposes of obtaining an apparent diversity of citizenship, different from the fact as tested by sound principles and correct rules of pleading. The court will, in such case, rearrange parties for the purpose of determining whether or not jurisdiction in fact exists. If it be in fact true, as appellant contends, that the water company is the real complainant, jurisdiction can not, of course, be predicated upon diversity of citizenship, but would be dependent upon the question of whether there exists a federal question.

We do not, however, understand the rule to be that because one or more of the defendants may have interests in the controversy, or some portion of it, of a character more closely kin to the rights claimed by the complainant than those asserted by the defendant, that the court is for that cause without jurisdiction, if it appear that the complainant is proceeding is his own right and for his own protection and has an independent title to the relief

prayed and sought, and that the bill is in good faith prosecuted by the complainant on its own behalf and for its own protection and benefit. If this were not the rule, bondholders of a corporation, though citizens of a different State from the wrongdoer, and though the title to their security is in a trustee also a citizen of a State different from that of the wrongdoer, would be without the right to ask the protection of a federal court in all cases where the corporation, whose bonds they hold, may be a citizen of the same State with the actual perpetrators of the wrong. The test is not whether benefit may unavoidably flow to some one or more of the defendants, if complainant is successful. Such a test applied to suits in equity would overturn the settled rules and well-recognized principles upon which courts of chancery have always acted in granting relief. For it will be found that a large part of the superiority of the equitable over the common law remedy inheres in the forms and rules of remedial procedure, and particularly in the rule which permits the plaintiff in a court of equity to bring in as defendants all parties necessary to enable the court to do complete justice with respect to the subject matter of the suit, without regard to the question of the attitude they may occupy towards each other or to the plaintiff. The common law procedure subordinates every other consideration to the necessities of the peculiar mode of trial, namely, the bringing of the case to an issue of law to be passed upon by the court, or an issue or few simple issues of fact to be tried by a jury by means of successive altercations of two parties ranged on opposites of a two-sided question and all parties were ranged, according to interest, on one or the other of the two sides. The consequent loss of power to do complete justice with respect to the subject matter, the loss of flexibility of remedy, the contracted and more or less artificial rules which grew up under this system and reflected themselves in the color which they gave to legal principles themselves, were amongst the great causes which made it necessary for courts of equity to interfere for the purpose of supplying the law's defi-

ciencies. It has never been held that the rule of law, defined and intended merely to prevent fraudulent and collusive suits, abrogates the settled rules of equity pleading by reducing everything in the case to a two-sided issue and ranging all persons according to the interest on one or the other of the two sides of that issue, and by such compulsory rearrangement of parties ousting the court of jurisdiction though the suit was properly according to the principles which regulate equity procedure and determine equity jurisdiction.

This bill is brought in the right of bondholders by their trustee, and solely for their protection. The subject matter of the suit is the bondholders' security. That security belonged beneficially to the bondholders. The legal title to it is their trustee. The Dawson Waterworks Company does not own the security created by that mortgage, or any part of it. The rights which the trustee sets up are distinct from any rights which may belong to the waterworks company. The waterworks company would not be a proper plaintiff to assert and invoke the aid in the protection of the rights of these bondholders. The equity of these bondholders is primary, original, independent. The security created by the giving of a mortgage is property which the court will protect against injury or destruction. The mortgagee acquires by his mortgage a right of which he may not be deprived by anything which the mortgagor may do, or omit to do. The contention of appellant, if allowed, would be more far reaching than merely to defeat the right of bondholders to invoke the protective aid of the federal court. If the contention be correct, that the creditor who gave the mortgage is a necessary party plaintiff, then the security created by the mortgage may be destroyed, and the mortgagee would be without right to invoke the protection of either the state or federal courts of equity.

In the case at bar, the wrongful acts of the city of Dawson had more than destroyed the value of the property over and above the mortgage security, and in large part had already destroyed the value of the security itself. What was left was insufficient to pay the mortgage debt, and no substantial

interest remained in the mortgagor. The mortgagor, by resolution, declined to take any action against the city. The mortgagor was powerless to cope with the situation, being left by the city's wrongful act almost insolvent and unable to secure the necessary funds to continue the operation of the waterworks and thus preserve this valuable contract and the property dependent upon the continued existence of such contract. It was necessary for the mortgagee to at once take action in its own behalf, or its security would be utterly destroyed and the damages sustained by it irreparable. It would be mockery to say to the mortgagee that the courts are not open to him, but that the insolvent mortgagor must be made a plaintiff before the court will design to grant any relief.

It is not meant by this that the Waterworks Company is not a proper party. It would be proper to join it as a party in order that the decree of the court might completely protect the City of Dawson against future litigation. The Waterworks Company is entitled to be heard, if it so desires, upon the averments as to its insolvency, as to its inability to cope with the situation, as to its refusal to sue, and other averments relating to transactions in which it was an actor. The Waterworks Company was a proper party in order that it might, if it desired, be heard in resistance of the complainant's prayer, that the hydrant rentals be utilized in betterments and extensions and not in extinction of the mortgage debt, as under certain circumstances the Waterworks Company might have the right to insist. And the Waterworks Company was entitled to its day in court upon the question whether or not such circumstances did exist as will be pointed out later on in the discussion. It was a proper and necessary party for the further reason that affirmative, equitable relief was prayed against it by the bill and granted by the final decree. This, however, is a very different thing from appellant's proposition, that the Waterworks Company is the necessary plaintiff, or a necessary plaintiff, and that the bill can not be maintained because the Waterworks Company does not join as plaintiff. That there is no improper joinder or arrangement of parties that jurisdiction may properly be invoked on the ground of "diver-

sity of citizenship," we think is abundantly established by the authorities.

154 U. S., 362, Reagan *vs.* Farmers Loan & Trust Co.

128 Fed. Rep., 907, City of Seymour *vs.* Farmers Loan & Trust Co. of New York, (Circuit Court of Appeals, Seventh Circuit).

63 Fed. Rep. 213 Bowdoin College *vs.* Merritt. (See opinion of Mr. Justice McKenna, at that time Circuit Judge.)

37 Fed. Rep., 817, Belding *vs.* Gaines *et al.* (decided by Mr. Justice Brewer at that time Circuit Judge, and Judge Caldwell).

97 U. S. 13, Hotel Co. *vs.* Wade.

131 Fed. Rep. 890, Farmers Loan & Trust Co. *vs.* City of Sioux Falls, Syllabus 3.

III.

It is, however, argued that the resolution of the Waterworks Company, authorizing the Trustee for the bondholders to demand and collect the water rentals, constituted an assignment or transfer of a chose in action, the original parties to which chose in action were both of them citizens of the State of Georgia, and that the Court had no jurisdiction on the ground of diversity of citizenship to render a decree against the city in complainant's favor for the amount of such hydrant rentals under the provisions of the Judiciary Act of 1887, to the effect that the federal courts shall not "have cognizance of any suit except upon foreign bills of exchange to recover the contents of any promissory note or other chose in action in favor of any assignee or of any subsequent holder, if such instrument be payable to bearer, and be not made by any corporation, unless such suit might have been prosecuted in such court to recover the said contents if no assignment or transfer had been made."

If the present suit were an action at law, brought by the Trustee for the recovery of the hydrant rentals, we think even in that case that the fact that in the waterworks contract the city undertakes and agrees to pay the hydrant rentals either to

the Waterworks Company or to the Trustee for bondholders, as alt ernative payees would give the Trustee the right to sue in a federal court.

128 Fed. Rep. 907, City of Seymour *vs.* Farmers' Loan and Trust Co. of New York.

The mortgage and the agreement that the mortgaged hydrant rentals might be collected by the Trustee are to be taken as subsequent acts merely completing the inchoate right of action in the Trustee by the original contract, and that the Trustee is not to be regarded as merely an assignee. We think, however, it is sufficiently clear that the Judiciary Act, above referred to, has no application to a bill in equity brought by the Trustee for bondholders to protect from destruction the security for their debt against wrongdoers, whose acts, if not restrained, would bring about such destruction ; and a court of equity, having jurisdiction for this primary purpose, would undoubtedly, we think, have jurisdiction to grant complete relief, though a part of that relief were the collection of hydrant rentals conveyed by the mortgage. We think, therefore, that the jurisdiction of the United States Court over the entire controversy, as a court of equity, clearly exists on the ground of diversity of citizenship, as well as on the ground of the existence of a federal question."

IV.

The Court had jurisdiction by reason of the Federal questions presented. The complainant in his bill asserts such rights under the Constitution of the United States, in that the contract existing between the city of Dawson and the Dawson Waterworks Company, constituting the basis of the security of the bondholders, and in which they showed beneficial rights entitled to protection, was impaired by the action of the city of Dawson, through ordinances adopted by its council, and the action of the city thereunder and in giving the same effect. It was also alleged that the property of the complainant

was taken without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States. These rights are explicitly asserted, and jurisdiction is distinctly invoked by reason of the suit being a suit arising under the Constitution of the United States. The city being one of the properly constituted instrumentalities of the State, the ordinances of the municipality are the acts of the State and their unconstitutionality is the unconstitutionality of a State law within the meaning of the Constitution and Acts of Congress touching the jurisdiction of the Federal Courts.

172 U. S. 1, Walla Walla City *vs.* Walla Walla Water Company.

189 U. S. 207, Davis & Farnum Manufacturing Company *vs.* Los Angeles, and citations.

181 U. S. 142, St. Paul Gas Light Co. *vs.* St. Paul, and citations.

"The grant of a right to supply water to a municipality and its inhabitants through pipes and mains laid in the streets of a city, upon condition of the performance of its services by the grantee, is the grant of a franchise vested in the State (which may be made by municipal authorities when the right to do so is given by their charters) in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against State legislation to impair it."

172 U. S. 1, Walla Walla City *vs.* Walla Walla Waterworks Company, *supra.*

That a contract for water supply was within the charter powers of the city of Dawson at the time the contract was made, we think the authorities hereinafter cited establish beyond a doubt.

"The jurisdiction of the Circuit Court is established when it is shown that the company had or claimed to have a contract with a State or municipality which the latter had attempted to impair, and so long as the claim is apparently

made in good faith and is not frivolous, the case can be heard and decided on the merits."

194 U. S. 112, Pacific Electric Railway Company *vs.* Los Angeles.
166 U. S. 557, City Railway Company *vs.* Citizens' Street Railroad Company.
180 U. S. 28, Illinois Central Railroad Company *vs.* Adams.

(Persons having a property interest in the contract and immediately and directly based thereon and derived therefrom, are, of course, equally within the rule).

It will hardly be contended that the existence of this contract and its impairment are not claimed in good faith, or that the claim is frivolous, in view of the same having been upheld after a most thorough and painstaking investigation by the learned Master in Chancery and the learned Judges of the Circuit Court. We take it, therefore, that whatever may be the opinion taken by this Court as to the merits of one or other of the complainant's contentions, the Court will have no difficulty in reaching the conclusion that the case is one of which the Circuit Court had jurisdiction, by reason of the suit being one arising under the Constitution of the United States. The Court, therefore, being a court vested with jurisdiction, will proceed to determine the case on the merits and grant relief as a court of equity.

V.

The case was not only a case within the jurisdiction of the Circuit Court, but was also a case falling properly within the jurisdiction of a court of equity. The public interests affected, the large number of people interested in the matter of water supply, the necessity for protecting public interests and safeguarding the rights of all parties during the pendency of litigation, the irreparable injury that would result if, in advance of a correct determination of the constitutional questions involved,

the city were to take action which would not only result in the destruction of this valuable waterworks property and the bonds of these bondholders, but would also involve the waste of public revenue which would result from the erection by the city of municipal waterworks for fire protection, in the erroneous belief that it was not bound to pay for the fire protection under this contract, if the contract be held valid, even though the franchise should be held not to be exclusive, make the present case peculiarly a case for the exercise of equity jurisdiction. "It is one of the most valuable features of equity jurisdiction to anticipate and prevent a threatened injury, where the damages would be insufficient or irreparable; and the exercise of such jurisdiction is for the benefit of both parties in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injury which if inflicted would be wholly destructive of his rights."

185 U. S. 65, Vicksburg Waterworks Company *vs.* Vicksburg.

The case presented is not simply a denial by the city of its obligation to pay. Such denial by an ordinance would not, without more, be any more efficacious than a denial of liability by plea. An ordinance, however, not only declining to pay, but attempting to repeal a valid ordinance making it the duty of the city to levy taxes for the payment of the service, accompanied further with an effort to continue to receive the benefits of the contract, while denying its obligation and denying the use, and further attempting again to collect taxes by levying upon the property of the Waterworks Company, in violation of the provision in the contract that services already rendered by the company should be accepted in payment of such taxes, and a course of conduct deliberately entered upon and stubbornly persisted in by which the various rights secured by the contract were destroyed, the city's obligations under the contract repudiated, denied and ignored, and the property deriv-

ing its value from the contract rendered valueless, is very far removed from the case of a simple refusal to pay and a denial of liability which can be met and redressed by an action at law for the collection of the rentals. All these things are in addition to the ordinances of the city for the issue and sale of bonds, and the erection of its own system of waterworks, not only to supply water to the inhabitants in violation of the city's express agreement that the Waterworks Company was to exclusively furnish water for such purposes during the life of the contract, but in violation of the city's express obligation to take all the water required for fire protection from the Waterworks Company during the twenty years that the contract ran. It will be hereafter shown, we think, that the exclusive franchise granted by the city to the Waterworks Company contravened no constitutional provision or rule of law, and is within the business powers vested in the city by its charter, and valid and enforcible.

In any event, the mutual obligations of the contract that the company should extend its mains and pipes, enlarge its plant, and generally enlarge its system from time to time to meet increasing demands consequent upon the growth of the city, and that the Waterworks Company on its part was to have the exclusive right to construct, maintain and operate waterworks in the city for the purpose of supplying the city, its inhabitants, citizens and residents, with water for protection against fire, and for domestic, sanitary and other useful purposes, embraced and constituted a valid agreement upon the part of the city to take from the Water Company all water that it should use during the life of the contract for protection against fire. To this extent at least the proposed erection by the city of waterworks was an impairment of the obligations of the contract, such as gave jurisdiction to the court in equity. (Walla Walla case, supra.)

The bill presented other reasons for the interposition of a court of equity. It is a suit by a trustee for bondholders under

"a deed of trust by way of a mortgage." The security thus created for bondholders was a trust fund. The subject matter of the suit was the protection of a trust fund against threatened injury and destruction.

In order to protect the security, money had to be raised and employed by the trustee, and thereby, the interests of the *cestuis que trust* were preserved. The bill prays for specific performance, and the right to specific performance is discussed later in the brief. Without anticipating that discussion at this time, we submit that it is at least within the powers of a court of equity to lend its aid to the trustee in the expenditure of money for the bondholders, for the purpose of enabling the Water Company to specifically perform its part of the contract pending the litigation, and after the city by its wrongful course of conduct had destroyed the power of the Waterworks Company to raise the necessary revenues for the purpose.

VI.

The contract between the City of Dawson and Bennett, which by transfer became the property of the Dawson Waterworks Company, will be found on pages 288 to 291 of the Record. The charter of the City of Dawson will be found on pages 220 to 229 of the Record.

The charter does not in express terms confer power to contract for water, but it contains what is commonly called a "General Welfare Clause," and this confers ample power to contract for a water supply.

1st Dillon, 4th edition, section 146, and authorities cited.
5 Ga. 561.
28 Ga. 50.
43 Ga. 67.
96 U. S. 341.

The contract between the City of Dawson and the Water Company was made in the form of an ordinance.

The power to contract by ordinance is undoubted.

18 Grattan, 517.

Next to the last paragraph of the ordinance also declares that it shall have the force and effect of a contract.

VII.

One question made by the Appellant in this case is, that the contract between the City of Dawson and the Waterworks Company, whereby the City obligated itself to pay annually a certain sum for hydrant rentals, and obligated itself to levy and collect, in every year, a tax for the payment of rentals of that year, creates a debt, and inasmuch as the State Constitution provides that no debt shall be created by a municipality without the sanction of a vote of the qualified voters of such municipality, that the vote required by the Constitution was not had, and therefore, the contract is void.

Our reply is, this contract does not create a "debt."

If the contract between the Appellant and the Waterworks Company had provided that at the beginning of each year the Appellant should enter into a contract for water for the current year, to be paid out of taxes of that year, it is not reasonable to suppose that any court would hold that such a contract created a debt within the meaning of the term "debt" as used in the Constitution of this State.

It is difficult to understand how the present contract can be held to be in any wise different from a contract of the kind just stated.

The obligation to take water for a period of years does not of itself create a "debt," for something is to be done in each year by the water company; and the city is to pay for the water as it receives it, that is, as the service is performed in each year by the water company.

Such a contract is simply an obligation to make the expense

of water supply a current, or ordinary, expense for each year during the life of the contract, and to be paid out of the current revenues of each year.

We are supported in this contention by the following authorities:

City of Valparaiso *vs.* Gardner, 97 Indiana 1, reported in 49 American Report, 416.
East St. Louis *vs.* East St. Louis, 98 Ill. 415.
31 Ill. Appeal, 325. See specially pages 339 and 340.
Weston *vs.* City of New Syracuse, 17 N. Y. 110.
Fall *vs.* Hazelrig, 45 Ind. 576.
Grant *vs.* City of Davenport, 36 Iowa, 396.
Water Company *vs.* Woodward, 49 Iowa, 58.
Utica Waterworks Co. *vs.* City of Utica, 31 Hun. 430.
Woods *vs.* City of Oklahoma, 2 Oklahoma, 158.
Crowder *vs.* Town of Sullivan, 128 Ind. 486.
Stedman *vs.* City of Berlin, 73 N. W. Rep. 57; 70 N. W. Rep. 739, reporting same case in 101 Iowa, 667.
New Orleans Gas Light Co. *vs.* City of New Orleans, 42 La. Ann. 188; 7 Southern Rep. 559.
Smith *vs.* Town of Dedham, 144 Mass. 177 (10 N. E. R. 782).
Saleno *vs.* City of Neosho, 127 Mo. 627; 30 S. W. R. 190. 128 Mo. 188; 31 S. W. R. 756.
Appeal of the City of Erie, 91 Penn. St. 398.
42 La. Annual 188—see page 191.
City of Danville *vs.* Danville Water Co. 180 Ill. 244; same case 54 N. E. Rep. 224.
Coles County *vs.* Goehrilg, 70 N. E. Repr. 610 (decided by Supreme Court, Ill., 1904).
Wade *vs.* Borough of Oakmont, 165 Penn. State, 479 (30 Atlantic Rep. 959).
Raton Waterworks Co. *vs.* Town of Raton, 49 Pac. R. 98. 67 Ga. p. 107.

It is useless to cite further authority on this question, as this

Court, in Walla Walla *vs.* Walla Walla Water Co., 172 U. S. p. 1, has decided that a contract of the kind now before the Court did not create a debt. On this point, in that case, the Court said:

> "But we think the weight of authority, as well as of reason, favors the more liberal construction, that a municipal corporation may contract for a supply of water or gas, or a like necessity, and may stipulate for the payment of an annual rental for the gas or water furnished each year, notwithstanding the aggregate of its rental during the life of the contract may exceed the amount of the indebtedness limited by the charter. There is a distinction between a debt and a contract for a future indebtedness to be incurred, provided the contracting party perform the agreement out of which the debt may arise. There is also a distinction between the latter case and one where an absolute debt is created at once, as by the issue of railway bonds, or for the erection of public improvement, though such debt be payable in the future by installments. In the one case the indebtedness is not created until the consideration has been furnished; in the other, the debt is created at once, the time of payment only being postponed.
>
> "In the case under consideration the annual rental did not become an indebtedness, within the meaning of the charter, until the water appropriate to that year had been furnished. If the company had failed to furnish it, the rental would not have been payable at all; and, while the original contract provided for the creation of an indebtedness, it was only upon condition that the company performed its own obligation. Wood *vs.* Partridge, 11 Mass. 488, 493. A different construction might be disastrous to the interests of the city, since it is obviously debarred from purchasing or establishing a plant of its own exceeding in value the limited amount, and is forced to contract with some company which is willing to incur the large expense necessary in erecting waterworks upon the faith of the city paying its annual rentals."

Again the Court say:

> "The obvious purpose of limitations of this kind in mu-

nicipal charters is to prevent the improvident contracting of debts for other than the ordinary current expenses of the municipality. It certainly has no reference to debts incurred for the salaries of municipal officers, members of the fire and police departments, school teachers, or other salaried employes, to whom the city necessarily becomes indebted in the ordinary conduct of municipal affairs, and for the discharge of which money is annually raised by taxation. For all purposes necessary to the exercise of their corporate powers they are at liberty to make contracts, regardless of the statutory limitation ; provided, at least, that the amount to be raised each year does not exceed the indebtedness allowed by the charter. Among these purposes is the prevention of fires, the purchase of fire engines, the pay of firemen, and the supply of water by the payment of annual rentals therefor."

VIII.

Every decision by the Supreme Court of Georgia which construed the term "debt," in respect of a contract of this character made prior to the date of the contract with the City of Dawson, and, prior to a large expenditure of money on the faith of the contract, is in line with the decisions cited in this brief.

In Mayor of Rome *vs.* McWilliams, 67 Ga. 107, will be found the first case in which a contract of the character at bar was construed, that is, this is the first decision upon the question, whether a contract for work, or service, to be performed, and paid for as performed out of the current revenues, constituted a debt.

In that case the majority of the Court decided that such a contract did not create a debt.

The Court said:

"The obligation to pay so far as the *time* of its inception as between the parties is concerned, is one thing, and an actual *indebtedness* within the meaning of the constitution

is another. I may enter into a contract for an architect to build me a house, but if he never does the work I owe him nothing; so if I pay him as he progresses, I will not be his debtor; so if I contract to pay him when the work is done, I owe him nothing till the contract is fulfilled, and if on its fulfillment I discharge it, I can not be said to have incurred a debt in the sense the constitution prohibits corporations from incurring."

At the date of this decision the court was composed of three judges, a majority of whom, two, could make a final decision and judgment.

See Code of Ga. of 1882—sections 210, 213 and 219.

The main opinion was delivered by Mr. Justice Speer, and concurred in by Chief Justice Jackson, who expressly concurs "in the reasons and conclusions given by Judge Speer."

It is claimed by the counsel for appellant, that the court had previously decided otherwise, in Hudson *vs.* Mayor of Marietta, 64 Ga., and in Spann *vs.* Board of Commissioners, 64 Ga. 498.

It will be seen that Mr. Justice Jackson, afterwards Chief Justice Jackson, delivered the opinion of the court in both cases last cited, and in his concurring opinion, as Chief Justice in the 67th Ga., he clearly draws the distinction between those two cases and the case in the 67 Ga. *supra*.

Mr. Justice Crawford dissented on the ground that the contract in question created a debt. See 67 Ga. 117. But it is a singular fact that Mr. Justice Crawford never referred to the decisions in 64 Ga., *supra*, in support of his dissenting opinion, nor does he allude in any manner to said decisions. His silence on that subject is clear proof that he agreed with Judge Speer, who delivered the main opinion, and with Chief Justice Jackson, who concurred in the main opinion, that the cases in the 64 Ga., *supra*, had not decided the question then before the court.

Mr. Justice Crawford was of the opinion that "it is the incurring a new debt, whether paid when the work is done, or five

years thereafter; it is a debt from making the bargain until paid."

Thus it will be seen that Judge Crawford was of the opinion that a mere bargain, an agreement, even though the cash was to be paid when the work was done, or the thing bargained for should be delivered, would constitute a debt from making the bargain.

In this view, Judge Crawford has never been sustained by any court. The Supreme Court of Georgia, in Conyers *vs.* Kirk & Co., 78 Ga. 480, in passing upon a contract which obligated the town to pay a certain sum for lamps when they should be delivered, said:

"If we take the evidence, as we do, most favorably to the plaintiffs, there was no intention that any debt should arise. It was contemplated that payment should be made as soon as the articles were delivered."

And further:

"The debt resulted from a breach of the contract, not from the making of it. Against paying a debt so originating, there is no constitutional impediment."

Our contention is that the contract with the city of Dawson for water supply was for the cash payment for water used in each year, and to be paid for as current or ordinary expenses out of the current revenues of each of such years.

It was not a contract for work done presently, and to be paid for in the future, as would be the case of a bonded indebtedness, notes or other obligations for the payment of money at some future time.

The next decision by the Supreme Court of Georgia, to which any special reference is made as to the validity of a contract like the one at bar, will be found in Lott *vs.* Mayor & Council of Waycross, 84 Ga. 681. In this case the Court said that the validity of a contract for lights running through a series of years was not before the Court, and then added:

"It is clear to our mind that the Mayor and Council of Waycross have a right to contract an annual indebtedness for the purpose of supplying lights to the town; and we do not think such contract would be an indebtedness such as is required by the constitution to be submitted to the vote of the people of the town."

The contract in the case at bar was made February 21, 1890, and the decision in Lott *vs.* Mayor & Council, *supra*, was handed down on March 14th, of the same year. The water company had a right to regard this decision as favorable to a contract of the kind at bar, and it went forward and expended a large sum of money in laying pipes, and erecting and putting in operation a water plant.

The profession of the State generally so regarded this decision, for it is difficult to see how there could be any distinction in principle between a contract made in each year for a supply of water in that year, and a contract to supply water in each year for a term of years, and the water to be paid for as furnished in each year out of the revenues of that particular year. In either case, the water furnished in any particular year would be paid for out of the revenues of that particular year. That is to say, a debt would not be created in any year, under either contract until the water should be furnished and there should be a refusal to pay; in other words, "the debt would result from a breach of the contract, not from the making of it."

This Court so understood the decision in Lott *vs.* Mayor & Council, 84 Ga. *supra*, for the Court cites this decision in support of its decision in Walla Walla *vs.* Walla Walla Water Co., 172 U. S. 1.

If this decision did not warrant the construction placed upon it, as above indicated, then it is quite clear that nothing adverse was hinted, and there was no reference to the decision in 67 Ga. *supra*, by the Court, although it was cited on the brief of counsel.

If the decision by the Supreme Court of Georgia in 67 Ga., *supra*, is, as we claim it to be, and its plain language can not be construed to indicate otherwise, then there was a decision by the Supreme Court of Georgia, at the date of the contract at bar, which would upold this contract as constitutional.

The Supreme Court of Georgia, in Dawson vs. Dawson Waterworks Co., 106 Ga. 696, undertook to distinguish the decision in 67 Ga., *supra*, and finally concluded that there was no real conflict in the two decisions. We do not see how the Court could have reached their decision in 106 Ga. 696, for the language we have hereinbefore quoted from the decision in 67 Ga. construes a contract of the character of the one at bar, not to create a debt—exactly in line with the decision in Walla Walla, and other decisions cited by us, while the Court in 106 Ga., *supra*, decides the very reverse.

But suppose that the Court in 67 Ga. did not decide the question as we claim, and as its plain language obviously imports there is certainly nothing in the decision to the contrary of our contention, or the Supreme Court in the 106 Ga. would have cited it as authority, instead of making an effort to show that there is no real conflict between the two decisions.

If this be the correct view of the decision in 67 Ga.—that is, that it does not decide either way on this question, then up to the time, and for some time after this contract was made, there was no decision by the Supreme Court of Georgia on the question, for it was held by the Court in the 67 Ga. that the two cases in the 64 Ga., *supra*, did not decide this question—and certainly no one will claim that Lott vs. Mayor & Council, 84 Ga., *supra*, was an adverse decision.

If the reasoning of the Court in 106 Ga. is correct, then this question—the construction of the term "debt" as applied to a contract of the character of the one at bar—was an open one when this contract was made, and remained so until August 1st, 1892, when the decision in the 89 Ga. 683, which is adverse to our contention, was rendered. When this last decision was rendered, the waterworks had been completed, the bonds had been issued and sold, and the water company had furnished water for about one year under the contract with the city. The works were completed and accepted August 12th, 1891. See page 307 of the record.

The situation up to August, 1892, was this: If the case in 67 Ga. does decide as we claim, then there was no prior decision in conflict therewith; so it is decided in that case, and there was no decision thereafter adverse to our contention until some time after the completion of the waterworks, the issue of bonds, etc., 89 Ga. 683, and the United States Court will not follow the last decision, even if the United States Courts are bound by the decision of the State courts in construing the term "debt."

If the decision in 67 Ga. did not decide the question as we contend, then there was never a decision by the Supreme Court of Georgia on this exact question until after the waterworks had been completed, put in operation, and the bonds had been issued and sold. This being true, the United States Court will not be bound to follow such decision.

We reiterate the statement, that the first time the term "debt" was construed adverse to our contention, as applicable to a concontract of the character of the contract at bar by the Supreme Court of Georgia, was in August, 1892, in what is called a "headnote decision," 89 Ga. 683. And the cases cited by appellants, and by the Supreme Court in 106 Ga., in support of the opposite contention, which were made prior to 1892, are easily distinguishable from the case at bar. The distinction between the contracts in those cases and the contract in this case is clearly and strongly stated by the Supreme Court of the United States in Walla Walla *vs.* Walla Walla Water Co., 172 U. S. 1.

The Supreme Court of Georgia, in 106 Ga., *supra*, refers to some decisions in support of the conclusions therein reached, but the slightest examination will disclose the fact that these decisions did not construe the term "debt" as applicable to a contract of the character of the contract in the case at bar. We now proceed to state the real points decided in the cases referred to by the Supreme Court of Georgia, to wit: the cases in the 64th Georgia and 74th Georgia.

We will state in brief, the points decided in the cases in 64 and 74 Georgia Reports, *supra*.

In 64 Georgia, 286, the town of Marietta made an exchange of its old for a new fire engine, agreeing to pay, in the *future*, $3,000 for difference in value of the two engines. Some citizens and taxpayers of the town filed a bill to enjoin the municipality from making the exchange of engines. The Mayor and Council admitted that they had agreed to create a debt; but set up that it could be easily met by taxation. It was also admitted that the people voted on the question simply of "exchange" or "no exchange." The Court held that this contract did create a debt, and that the proposition to exchange had not been submitted to the voters of the city according to any law of the State "*or of the city* prescribed for such an election at any time," and the Court accordingly held the contract to be void. It was held that the election was void because there was no law of the State, "*or of the city*" which authorized it.

In 64 Ga., 498, there was a purchase of iron safes by the County of Webster. After these safes were purchased and had been delivered, the county authorities levied a tax to pay for them, and it was held that the county had created a debt, and without the sanction of a vote by the people, the contract was void, and the tax could not be levied for paying said debt.

See 67 Ga., 116, wherein it is said that these decisions are not applicable to a contract for erecting a public building, and to be paid for as it is being built, or when finished—*i. e.*, the character of the contract in the case at bar.

The comments found in 67 Ga., 116, on the two decisions in the 64 Ga., *supra*, are by Chief Justice Jackson, who, as Associate Justice, delivered both opinions of the court in the 64 Ga.

It is claimed by counsel for appellants that the decision in 67 Ga., 107, simply decides that as there was, or would be, money in hand to pay for the buildings, the Court held the contract did not create a debt. We call attention to the reasons given by Judge Speer above in this part of the brief, for upholding that contract—a contract of the character of the one before this court. And we call attention to the concurring opin-

ion of Judge Jackson, wherein he says "I concur in the *reasons* and conclusions given by Judge Speer."

We do not see how any one can claim that the two cases in 64 Ga., *supra*, construed a contract of the character of the one at bar, or contend that the "reasons" given and the "conclusions" drawn by Judge Speer, concurred in by Chief Justice Jackson, in 67 Ga., 107, do not support our contention, to-wit: That at the date of the contract in the case at bar the only decision upon a contract of its character was that such a contract did not create a debt. See pages 27 to 32 both inclusive of original brief.

74 Ga., 845, is cited by counsel for appellants as deciding adverse to our contention. In that case the Ordinary of Habersham county contracted to pay for certain wrought-iron work which had been done for the county, on the 25th day of December, 1884, and if not paid at that date, the contract should bear interest at the rate of eight per cent. per annum. The Court, speaking through Chief Justice Jackson, decided that this contract created a debt. The work had been done, and was to be paid for in the future. The contract in that case was not of the character of the one at bar, where no debt can possibly arise, if the contract is complied with, for as the water is furnished in each year, it is to be paid for out of the revenues of that year.

It is well to remember that the judge who delivered the opinion in the last cited case, concurred in the opinion in the 67 Ga., *supra*, and in that concurring opinion stated that the two decisions in 64 Ga., *supra*, did not decide the validity of a contract of the character of the one at bar. This judge did not suppose for one moment that any one would ever contend that there could be any conflict between the decision in 67 Ga., *supra*, and the decision in 74 Ga., *supra*, for the contracts are totally unlike.

IX.

We insist that the decision in the 98 and 106 Ga., *supra*, are not binding on this court, because it is not such a construction of the State constitution that the United States Courts feel that they are bound to adopt and follow, but it simply construes the term "debt"—that is, decides what constitutes a debt. This was a decision of a question of general law, which a United States Court will decide for itself.

107 U. S., 33–102–529.
12 Howard, 139.
161 U. S., 149.

X.

But if the decisions in the 89 Ga. and 106 Ga., *supra*, be treated as a construction of the State constitution, we say they should not be followed by this court, because the contract in the case at bar had been made, the waterworks had been erected and put in operation at a large outlay of money, and the bonds, secured by a mortgage thereon, had been issued and sold before any adverse decision had been made.

To follow the later decisions of the State Courts construing State laws, after contracts had been entered into, during a time when the construction placed upon such laws was different, would be for the Federal Courts to abdicate their high constitutional function of upholding unimpaired the obligation of contracts.

This court has repeatedly held that the Federal Courts will not follow decisions of the State court construing State laws where contract rights which have accrued prior to the rendition of such decisions might be thereby injuriously affected; but in all such cases will exercise, and will uphold all contract rights based upon earlier decisions, or upon a natural and sound interpretation of the laws themselves, in the absence of such decisions at the time the contract was made.

The leading case is Douglass *vs.* Pike County, 101, U. S. 677, where the rule is laid down:

> "This Court treats the construction which the highest court of a State has given to the statute of the State as a part of the statute.
>
> "But where different constructions have been given to the same statute at different times, it will not follow the latest decisions if thereby contract rights which have accrued under earlier rulings would be injuriously affected.
>
> "The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, not retroactive."

See cases therein cited.

See also, 8 Wallace, Butz *vs.* City of Muscatine, where the Court say that the relator's "right can no more be taken away by subsequent judicial decisions than by subsequent legislation. It is as much within the sphere of our power and duties to protect the contract from the former as from the latter, and we are no more concluded by the one than the other."

It would needlessly consume the time of the Court to encumber the brief with the long line of decisions upon this subject.

We, however, cite a a few recent decisions which have applied the principle to cases somewhat like the case at bar:

89 Fed. 257, Coler *vs.* Board of Commissioners of Stanley County.

85 Fed. 359, Bartholomew *vs.* City of Austin, Texas.

90 Fed. 7, Union Bank *vs.* Board of Commissioners, etc.

89 Fed. 123, Vermont Loan and Trust Co. *vs.* Dygert.

83 Fed. 403, Cæsar *vs.* Capell.

79 Fed. 477, Jones *vs.* Great Southern F. P. Hotel Co.

88 Fed. 749.

XI.

It is claimed by appellants, that the decision of the Supreme Court of Georgia in City of Dawson *vs.* Dawson Waterworks Company adjudicated the rights of complainants (the appellee) under the contract between the city and the waterworks company, and that the appellee is estopped thereby from again calling in question the meaning of the term "debt." This point is presented to this Court by the fifth assignment of error.

We think it clear that the Trustee is not estopped by that decision, and for the following reasons:

(a) Estoppels are not favored by the Courts—they are odious—and he who alleges an estoppel must clearly establish it. The burden is on the defendant to establish the estoppel in this case, and if the Court has a doubt on the subject, the defendant must lose on this point.

(b) A judgment is not an estoppel, unless it be for the same cause of action, and is between the same parties, and for the same right.

45 Cal. 439.
Code of Ga. of 1895, Section 3741.
Black on Judgments, Sec. 534, pp. 809 and 810.
64 Hun. (N. Y.) 202.
98 E. Y. 311.

(c) In City of Dawson *vs.* Dawson Waterworks Company, the suit was for water rental for the year 1895. This suit is for water rental for 1896, 1897 and 1898, and under the contract the water rental of each year is a separate and distinct contract, or cause of action, for the payment of rental for each year depended upon the performance of the terms of the contract by the water company in that year.

50 Fed. 690.

Hence, we insist, that the cause of action in the two suits is not the same.

(d) It is insisted by appellant that a decision by the Supreme Court of this State of the meaning of the term "debt," is binding upon the parties in any future action to recover water rentals, although the rental of each year may be a new cause of action. This we deny—the decision by a Court of a point in one case is not *res adjudicata* as to that point in another suit for a different cause of action.

(e) But if this contention be not sustained, we say a judgment will not estop any one but parties or privies. It is not pretended that the present complainant was a party to that suit, but on the contrary the evidence is overwhelming that the Trustee was never advised of that suit—never heard of any controversy between the City of Dawson and the Water Company—interest was paid regularly on the bonds, and it supposed the interest was paid by the Water Company, until after the decision by the Supreme Court of this State had been made. It, therefore, follows, that the trustee was not a party, either directly or indirectly to that suit.

(f) As the trustee was not a party, then the question arises, was it a privy. The trustee was not a privy unless it was so identified with the Water Company in estate, or in law, as to be affected by the acts of the Water Company in that litigation. We say it was not the privy of the Water Company, so that the acts of the Water Company, short of collecting the rentals, *i. e.*, benefiting the estate, would be binding upon the trustee.

(g) If the trustee be treated as privy to the Water Company, in the relation of mortgagor or mortgagee, then we insist that no act done by the mortgagor, without the consent of the mortgagee, after the date of the mortgage, which is not beneficial to the estate, could bind the mortgagee—and no judgment rendered against the mortgagor after the date of the

mortgage, to which the mortgagee was not a party, could conclude the mortgagee.

169 U. S. 243.
130 U. S. 493.
152 U. S. 301.

(h) The contract between the Water Company and the City of Dawson obligates the city to pay the rentals to the Water Company, "*or the trustee for its bonds.*" Now if the rule applicable to joint makers of notes is made applicable to these *several payees*, for they are made several by the express language of the contract, then the judgment against the Water Company, to which the trustee was not a party, does not bind the trustee.

44 Fed., 49.
55 Vermont, 329.
14 Iowa, 47.

(i) If the relation of the trustee to the mortgagor be treated as the relation of one tenant in common to another, then the judgment is not binding upon the trustee, for it was not a party.

47 Fed., 547.
52 Texas, 383, which was reaffirmed in 58 Texas.
Freeman on Co-Tenancy, par. 168, p. 245 (2d Edition.)

The trustee and the waterworks became the joint owners of the rental of each year under the contract, they stand before the court as tenants in common in respect of this right. Either had the right to collect the rents, and either has the right to sue for the same. Had the suit by the water company been productive, it would have been beneficial to the estate, and as a consequence to the trustee, but the trustee is not concluded by an unproductive suit of the water company, unless it was a party.

52 Texas, 583, and other authorities cited.

(j) The contract makes the trustee and the water company alternative payees, in severalty, not jointly, and if they are in law related to each other as are the holders of notes made as part of the same transaction, a judgment against the holder of one of such notes does not affect the holder of another note, who was not a party to such a suit.

41 Iowa, 513.

(k) Our contention is that the trustee in this case stands upon a better footing than the holder of such note. The promissory notes referred to in the case quoted were parts of one closed transaction—but not so with the yearly water rentals in this case. The contract was made to cover several years, but the water company was to perform certain service in each year, and for that certain service to be performed in each year the city was to pay to the water company, "or to the trustee," a certain amount of rentals for the service of that particular year. In other words, the obligation was for services in the future, and the water company was required to do certain things in each successive year to earn the rental of that year. Hence, the contract for no one year was completed, but under the very terms of the contract an obligation would arise to pay rental in each year provided the service was rendered in that year. Hence we insist that liability for rent of any one year is a separate and distinct liability from that of any other year, and a suit for the rentals due for 1896, 1897 and 1898, is not for the same cause of action as that contained in the suit for rentals due for the year 1895. They are separate and distinct causes of action. The trustee has the right to bring this bill for the protection of the rights of the holders of the bonds, and this suit can not be affected by any decision, on any point, in any case, by any court, prejudicial to the interest of the trustee where it was not a party.

The trustee had the right to sue as alternative payee, and would not be concluded by a judgment against the other alternative payee, suing for a different payment, though the same defense should be made in both suits.

Durham *vs.* Evans, 2 McLean Reports (circuit court), p. 139.

Nor would the trustee, suing as mortgagee (and even if we leave out of the consideration the fact that defendant's contract made the trustee alternative payee) be bound by the result of a suit brought by a mortgagor.

130 U. S. 493, Hassall *vs.* Wilcox.
152 U. S. 301, Keokuk & Western R. R. Co. *vs.* State of Missouri.

We think the authorities sited abundantly established the proposition that no judgment rendered in a suit by the Dawson Waterworks Company for the water rental for the year 1895 could by any principal of *res adjudicata* bind or affect the rights of the trustee for bondholders who is suing in the present action to recover the rentals for the years 1896, 1897, and 1898, under express contract right contained in the contract of February 21, 1890 (Exhibit B of bill), and also conferred by the mortgage of September 1, 1891 (Exhibit A of bill). Nor can such judgment affect the right of the trustee to proceed in and by the present bill to ask an injunction to enjoin the city from erecting waterworks of its own, in violation of its contract, and from doing the other acts whereby the rentals and other revenues for future years (pledged by the mortgage) will be cut off, and the mortgaged property largely destroyed.

(1) But another and complete reply to defendant's contention that the matter is *res adjudicata* is found in the fact that there has been as yet no final judgment in the case in the State Court. Until there shall be such final judgment, there is nothing that could be pleaded as *res adjudicata* against the Dawson Waterworks Company.

That suit was based on the right of the Waterworks Company to recover for the use of the water by the city for the year 1895. It does not set up the right to recover for the year 1896, or the year 1897, or the year 1898, nor does it set up any

of the equitable rights, or invoke the equitable remedies, and protection, which constitute the trustee's cause of action in the present bill.

There has been no judgment reached in the State Court, which can bind anybody, or conclude anything. The case is still pending in that court undecided.

(m) Even if the decisions of the State Supreme Court were such as might probably lead to a result adverse to plaintiff in that case on the second trial, there would still be no estoppel by judgment on the principle of *res adjudicata* till such trial and final judgment thereon. Until such final judgment, plaintiff can at any time voluntarily dismiss its action, with right to renew it, in the same court, or in a different court.

Code of Georgia, 1895, sections 5043, 5044.

"A matter is not *res adjudicata*, though litigated in the courts of the State, where, after such decision is made, and the case remanded the plaintiff takes a voluntary nonsuit, as permitted by the State law, and no final judgment is entered."

90 Fed. 7, Union Bank of Richmond, Va. *vs.* Board of Commissioners of Oxford, N. C. 1.

Nor does any principle of comity make such decision binding on the Courts of the United States, so as to impeach the validity of contracts, or bonds, regarded as valid at the time they were made. To so hold would be to deprive the parties claiming under such contracts or bonds of the protection guaranteed to contracts by the National Constitution. For, under the provision of that constitution, the obligation of contracts can no more be impaired by judicial decision than by legislation.

Same case, 90 Fed. 7.

And the examination of that case shows clearly that if the Dawson Waterworks Company were now to dismiss its suit in the State Court and sue in the United States Court for the same

year's rental, the United States Court would clearly have jurisdiction by reason of the constitutional questions. Also 172 U. S. I.

XII.

The assignments of error, which allege error in granting the injunction because of a want of equity in the bill, and because there is a remedy at law, and, that the facts do not make a case for specific performance, we will discuss in this division of our brief.

(a) The allegations in the bill, and the evidence snbmitted in support thereof, make this a case for equity jurisdiction.

172 U. S., see page 11, H. N. 3.

90 Fed. 753. See narrative statement of facts in this brief.

(b) The conduct of the defendant is such as to result in the destruction of plaintiff's property, unless it is arrested by injunction. There is, therefore, equity in the bill, and complainant can not have adequate remedy at law.

147 U. S. 248.

(c) The contract between the water company and the City of Dawson obligates the city to pay the rentals to the Waterworks Company, *or to the trustee for the bonds.*

The mortgage made by the trustee for the bonds by the water company covers all of the property of the water company, including the rentals.

It is the water rentals that gives value to the bonds, and in order to fully secure the bonds, the City of Dawson contracted to pay direct to the trustee, and thereby conferred upon the trustee the right to demand and collect the rentals.

The effort is now made to pursue a course utterly destructive of that right, and the trustee can maintain a bill to arrest that course, and compel both of the other parties to the contract to specifically perform the same.

41 S. W. 1015, Ky. Appeals. Strong case.

(d) The City of Dawson, by the express terms of the contract, pledged the rental, in trust, to secure the payment of the bonds and interest, and it is this trust that is now sought to be enforced by specific performance and mandatory injunction. Mandatory injunction is the remedy.

166 U. S. 557.
41 S. W. 1015, *supra.*

(e) The City Council, by ordinance, on June 27th, 1894, repudiated the contract, for the purpose of forcing the water company to sell its plant. See record pp. 316, 317, 318, 319.

On October 4th, 1894, the City Council, by ordinance, ordered an election to be held on November 19th, 1894, to authorize the issuing of $35,000 in bonds for the purpose of purchasing or erecting waterworks.

On November 5th, 1894, the City Council of Dawson postponed the election to December 12th, 1894, "to determine whether the City shall issue $35,000 of 6 per cent. bonds" for the purpose above indicated.

On December 13th, 1894, the City Council declared, by ordinance, that the proposition to issue bonds had been carried.

In March, 1899, the City Council determined to proceed to issue and sell bonds, pursuant to the vote above indicated and to erect waterworks of their own. This is admitted in the answer.

These ordinances impair the obligation of the contract, and bring this case squarely within the Walla Walla case.

185 U. S. 68.
172 U. S. 1. Also,
166 U. S. 557.

In the Walla Walla case the City contracted not to take any interest in any other waterworks. By a subsequent ordinance the City determined to build waterworks of its own, and this Court held that such action impaired the obligation of the City's contract with the water company.

There is no difference in the two cases—in that case the City contracted not to take any interest in any other waterworks, while in the case at bar the *exclusive privilege* to lay water pipes, mains, etc., in the streets was granted in order to furnish the city with water for the life of the contract. This stipulation is just as binding upon the city of Dawson as was the contract in the Walla Walla case, binding upon that city. For, having granted such exclusive privilege to the water company, it could not erect a plant of its own.

39 N. J. Equity, 367.

(f) If the Dawson Waterworks were out of the case, the Court would have jurisdiction of the case as between the Trustee and the City, and for two reasons:

First: Because the obligation to pay water rentals is to the trustee, as hereinbefore stated, and the trustee can sue for any year for which the Water Company has not sued.

Second: The right to sue being in the Trustee, equity has jurisdiction, as the remedy at law is not so complete as in a Court of equity. For, it is necessary to enforce the contract in order to preserve the property of the holders of the bonds, which can not be done in a Court of law.

172 U. S. 1.

(g) After bonds have been issued and sold, and the proceeds used to erect waterworks, neither the City of Dawson, nor the Water Company, nor both combined, will be permitted by a Court of equity to do anything, or omit to do anything, which will destroy the security for the bonds—the contract for water supply and the payment therefor.

XIII.

The appellant contends that the municipal corporation of Dawson had no power, under its charter, to grant an exclusive

franchise, and such a grant is contrary to the Constitution of of Georgia.

We insist, first, that this contention is unsound, and second, if the contention that the city had no power to grant an exclusive franchise be sound, the city can not resort to such claim as an excuse for violating its contract to take water from the water company during the life of the contract.

It will be conceded, we suppose, that the "general welfare clause of the charters" confers the power upon a municipal corporation to contract for water. See authorities cited in the sixth division of this brief.

In the 106 Ga., *supra*, p. 709, in discussing the authority of the City of Dawson to make a contract for water, after stating that said City could raise a tax sufficient to pay for water for domestic use, and to protect the inhabitants against fire, the Court said:

> "A supply of water for these purposes may be procured by a municipal corporation either by building itself the *works necessary* for the purpose, or by making a contract with other persons to supply the same."

If the city could build waterworks, it certainly could lay its mains and pipes in the streets, for without them the water could not be distributed through the city. If the city could, by contract, procure that to be done which it could itself do, then it follows that the City had the power to grant to the Water Company the right—franchise—to use the streets for laying mains, pipes, etc.

The inhibition in the Constitution of Goorgia against making irrevocable grants is contained in article 1, section 3, paragraph 2, of the Constitution—section 5730, Code of 1895, and that provision is as follows:

> "No bill of attainder, ex post facto law, retroactive law, or law impairing the obligation of contracts, or making irrevocable grants of special privileges or immunities, shall be passed."

That provision of the State Constitution is directed against legislative acts and not against the exercise of the business powers of municipalities as the agents of their citizens in contracting for water and other articles for the general welfare of the city. In respect of these matters there is no express inhibition in the Constitution or Statutes of Georgia against the grant of an irrevocable franchise by a city.

But if it be true that the constitutional provision on this subject applies to the grant of an exclusive right by a city to a water company to occupy its streets, then we insist that the City of Dawson having granted such exclusive right can not withdraw it, because the withdrawal thereof would do great injustice to the Water Company and its creditors, *i. e.*, the holders of its bonds.

Article 1, section 3, paragraph 3, of the Constitution of Georgia—Code of 1895, section 5731, provides as follows:

> "No grants of special privileges or immunities shall be revoked, except in such manner as to work no injustice to the corporators or creditors of the incorporation."

While we do not concede that the City of Dawson could revoke the grant of the exclusive right to occupy its streets made to the Dawson Waterworks Company under the circumstances, yet if it does so it must be done on such terms, and under such regulations, as "will work no injustice to the corporators or creditors of the incorporation."

The City of Dawson has not attempted to revoke the exclusive right to occupy its streets granted to the Dawson Waterworks Company, in order that another company might be authorized to occupy its streets, but the city has undertaken to revoke its solemn contract made with the Dawson Waterworks Company in order to force the Dawson Waterworks Company to sell its property to the City, or for the purpose of erecting waterworks of its own, in violation of its solemn contract with the Waterworks Company. This, we apprehend, no court will hold the City can do.

We doubt if the City could be heard to raise the question, *i. e.* that it had transcended the law in granting an exclusive right to the waterworks company to lay its pipes in the streets of the City.

36 Iowa, 396 (7).
10 N. W. 886, bottom p. 888.
35 Pac. Rep. 693, bottom p. 696.

If it be true that the City of Dawson could not grant the exclusive right to the Water Company to occupy the streets with its pipes, etc., yet said Water Company has the right, under the terms of the contract, to occupy the streets for the purpose for which the right was granted during the life of the contract with the city, and during that period the city would be bound, under the terms of the contract, to receive and pay for water according to the terms thereof, for the city certainly possessed the power, as an incident to its principal undertaking to "bind itself to carry out the contract in good faith, and with decent regard for the rights of the other party."

Walla Walla *vs.* Walla Walla Water Co., 172 U. S. 18.

To permit the City of Dawson to erect waterworks of its own to supply itself with water for fire protection, when it had by contract agreed to take the water furnished by the Wateworks Company for this purpose during the life of the contract, and that it would pay the stipulated price therefor, is to permit it to violate the express terms of the contract. To furnish water to the inhabitants when it had agreed by contract that such water was to be furnished by the Water Company during the life of its contract, and thereby enter into ruinous competition with the Company, is certainly contrary to "the fair intendment of the contract" even if the contract contained no express provision on the subject.

Walla Walla *vs.* Walla Walla Water Co. 172 U. S. 1, on pages 17 and 18.

Aside from the question of whether or not the city could grant the exclusive right to the Waterworks Company to lay its pipes in the streets, we insist that the stipulations entered into between the City of Dawson and the Dawson Waterworks Company make a contract for the exclusive right of the Waterworks Company to furnish water to the city, and the duty on the part of the city to take water exclusively from the Waterworks Company during the life of the contract.

(a) The attention of the Court is called to the first paragraph in the contract between the City of Dawson and the Dawson Waterworks Company, found on page 288 of the printed record in this case. That portion of the contract provides that: "The City Council of the City of Dawson, Ga., do hereby grant to R. L. Bennett, of Philadelphia, Penn., and his associates, their successors and assigns, who are to organize a company to be styled 'The Dawson Waterworks Company,' the exclusive right and privilege for a period of ninety-nine years, of constructing, maintaining and operating a system of waterworks for the purpose of supplying said city and its inhabitants with water for protection against fire, and for domestic, sanitary and other purposes."

(b) This gives to the Dawson Waterworks Company the exclusive right and privilege of constructing, maintaining and operating a system of waterworks for the purpose of supplying said city and its inhabitants with water for protection against fire, and for domestic, sanitary and other purposes. This exclusive right to furnish water has no reference whatever to the exclusive franchise to use and occupy the streets, which will be found in the second paragraph in the contract. (Printed record, page 288.)

(c) Attention is called to section 10 of the contract, and found on page 290 of the printed record, and which is as follows:

> "That full assent is hereby given to a charter to be granted by the Legislature of the State of Georgia, to the said R. L. Bennett and associates, their successors and assigns, or to be obtained by them, under the general incorporation laws of said State incorporating them, into a

body corporate, under the title of the Dawson Waterworks Company, and granting to said company the exclusive right to contract, maintain and operate a system of waterworks in said city of Dawson, for the purpose of supplying said city, its inhabitants, citizens, residents with water for protection against fire, and for domestic, sanitary and other useful purposes, and to make such reasonable rates and regulations for the government of private consumers in the price of water, and to charge such rates therefor as the said company may determine upon. Provided, the rates do not exceed those established by this ordinance."

(d) Here, again, is an explicit agreement on the part of the City of Dawson that the Dawson Waterworks Company shall have the exclusive right to construct, maintain and operate a system of waterworks in the city of Dawson for the purpose of supplying said city, its inhabitants, residents, etc., with water; which is just as strong as was the contract in the Walla Walla case that the City of Walla Walla would not take water from any other company, because the exclusive right given to the Dawson Waterworks Company to furnish the city and its inhabitants with water, excludes all idea that the City could take water from any other source.

(e) The last paragraph in section 4 of the contract (printed record, page 289, provides as follows:

"The said company, and their successors and assigns, shall be, and are required, from the completion of their system of waterworks till their charter shall cease, to furnish a sufficient supply of water for the purposes before and hereinafter mentioned, unless prevented by unavoidable and providential causes. In such event they shall be allowed a reasonable time to make repairs, and if, after such reasonable time has been allowed, they should still fail to furnish said supply of water, their franchise from that fact be forfeited."

Here we have a stipulation that if the water company does not furnish both the city and its inhabitants with water, that the contract would be forfeited, thus showing that it was compulsory on the part of the Waterworks Company to furnish the city as well as the citizens, and that under the terms of the con-

tract the City obligated itself not to take water from any other source, nor should its citizens take water from other sources by its consent or procurement.

(f) Section 2 of the contract, and reported on page 288 of the record, provides for an exclusive right and authority to lay water pipes, mains, etc., in the streets. We have discussed the validity of this franchise elsewhere in this brief. But, if it be true that this exclusive franchise to use the streets could not be granted, this fact can not in any wise affect this case, for we rely upon the fact that the contract, in the sections above quoted, show that the City of Dawson made a contract with the Dawson Waterworks Company to take water exclusively from that company and none other, both for its own use and for the benefit of its citizens, and brings the case squarely in line with the Walla Walla case in 172 U. S., where there was an agreement on the part of the City of Walla Walla not to take water from any other company, or any other source than from the Walla Walla Water Company.

The fact that the contract with the City excluded the city from getting water from any other source, did not render it void.

> Davenport Gas and Electric Co. *vs.* City of Davenport, 98 N. W. Rep. 892. Head-note 6, p. 896 (Supreme Court of Iowa, 1904).

The cases cited by the appellant in the court below, to sustain the proposition that the City had no power to grant to the Waterworks Company the exclusive right to lay water-pipes in the streets, etc., will be found on examination not to conflict with appellee's position in this case. Two of these are cases of exclusive grants to street railways. The case in 28 Fed. 529, is readily distinguishable from the present case, and this fundamental distinction was in the mind of Judge Brown, who, after quoting from a case somewhat similar to the case at bar (which was relied on by one of the parties), uses this language:

> "We can not assent to a similar interpretation of the franchise in this case. The City (in the case before Judge

Brown) does not obligate itself to take any particular quantity of gas, or to continue the exclusive employment of gas for a definite period. The contract between the City of Munich and the Gas Company is not set forth in the opinion, but the language would indicate that the City bound itself in terms to have its streets lighted with gas. If this be so, the case differs very materially from the one under consideration."

28 Fed. 539.

The other case cited by appellant is similar in its facts to the last; although some of the language used may be broader than a decision of the case required.

The distinction between these and similar cases, and the case at bar is clearly pointed out by this Court in the Walla Walla case, head-note 6 of opinion, pages 17 and 18, 172 U. S.

The exclusive right to lay pipe was given to the Dawson Waterworks Company, and the City can not repudiate the contract, and the trustee, who holds a mortgage on all the rights of said company, will be protected by a court of equity.

Vicksburg Waterworks Co. *vs.* Vicksburg, 185 U. S. 65.
Anoka Waterworks Co. *vs.* City of Anoka, 109 Fed. 580.
115 U. S. 683, 650.
120 U. S. 64.
85 Fed. 359.
39 N. J. Equity 367, Atlantic City W. W. Co. *vs.* Atlantic City, *et al.*
177 Penn. State 643, White, *et al. vs.* City of Meadville.
20 American Reports 283, Stein *vs.* Mayor of Mobile (same case, 49 Ala. 362).

We contend that the grant of exclusive right to the Water Company to use the streets will be construed, at least, as an obligation on the part of the City not to take water from any other source during the life of the contract, and such contract will be enforced by a court of equity.

39 N. J. Equity, 367.

We have carefully read the cases of Bienville Water Supply Co. *vs.* Mobile, 175 U. S. 109; Bienville Water Supply Co. *vs.* Mobile, 186 U. S. 212; City of Joplin *vs.* Southwestern Missouri Light Co., 191 U. S. 150; Defiance Water Co. *vs.* Defiance, 191 U. S. 184; Skaneateles Water Co. *vs.* Skaneateles, 184 U. S. 354; Capital City Light & Fuel Co. *vs.* Tallahassee, 186 U. S. 401; Newburyport Water Co. *vs.* Newburyport, 193 U. S. 561; Gloucester Water Supply Co. *vs.* City of Gloucester, 193 U. S. 580, and Shaw *vs.* City of Covington, 194 U. S. 593; and in none of those cases was there any such contract between the city and the water company as was made in the case at bar. In no one of those cases was there a contract made between the city and the water company for a period of time which the city undertook to revoke.

XIV.

The appellant contends that the evidence shows that the Dawson Waterworks Company failed during the years 1896, 1897 and 1898, to perform its part of the agreement—that it did not furnish water, and was not able to do so during said years.

On August 12, 1891, the Waterworks had been completed, and, on that day, the Mayor and Council of Dawson declared that "after fully testing the system, the same is hereby accepted from this date, in full compliance of the contract, and in many particulars exceeding the contract, and none being less than called for in the contract." Bottom of page 97 and top of page 98 of Record.

Thus it will be seen that in all respects the waterworks were satisfactory when completed, and the evidence does not show any real difference between the works at that date and on any date since. The history of the case set out in the "Statement of Facts" at the head of this brief will show that there was really never any cause for complaint, but the alleged complaints were excuses merely on the part of the Mayor and Council for refusing to pay water rentals.

The defense that the water company did not carry out its contract in any year can not be made available, as the contract points out how complaints of this kind are to be made available, as follows:

> "The said Company and their successors and assigns shal be, and are required, from the completion of their system of waterworks till their charter shall cease, to furnish a sufficient supply of water for the purposes before and hereinafter mentioned, unless prevented by unavoidable and providential causes. In such event they shall be allowed a reasonable time to make repairs, and if, after such reasonable time has been allowed, they should still fail to furnish said supply of water their franchise from that fact be forfeited."

This contract contemplates that complaint shall be made, if the water company fails to live up to its contract in the respects mentioned, and if, after such reasonable time from the making of such complaint, the water company does not make such changes, or repairs, as will give a sufficient supply of water, then the franchise shall be forfeited. In other words, the contract itself provides how, and for what reason, the contract shall be forfeited—and in no other way can it be forfeited. No notice was ever served on the water company that it had not furnished a supply of water, nor was any action taken in respect of the supply or quality of water, but a resolution was adopted declaring the franchise forfeited.

The City of Dawson could not put an end to the contract in this way.

When the waterworks were completed, the city inspected and tested them, and declared, by resolution, that the work was fully up to the contract in all respects, and in some respects exceeded the contract.

This being true, and as the contract provides the method of a forfeiture of the franchise, i. e. the abrogation of the contract, which has not been followed, the City's defense can not avail.

But the evidence shows that no just ground for complaint

exists. If such should exist, the contract affords the remedy. And the remedy provided by the contract should be pursued.

Walla Walla case, *supra.*

No complaint as to the service, or complaint of any character, was ever made to the trustee, nor to the Waterworks Company till years after the City ceased to pay for the service it has never ceased to use. And the evidence shows conclusively that no real ground for complaint ever existed.

If the City claims now that repairs or betterments are needed, with what show of equity can it ask that the Waterworks Company could make these repairs or betterments, when the City is withholding about twelve thousand dollars water-rentals since 1894, which it justly owes for water already furnished and accepted, and when its act in thus withholding money it justly owes leaves the waterworks company without funds or the ability to float further bonds for the purpose of raising funds?

XV.

The appellant contends that the Court did not have jurisdiction, because it appears that the Dawson Waterworks Company should have been a party plaintiff.

In reply to this assignment of error, we call attention to the fact that the trustee prays a specific performance of the contract on the part of the Waterworks Company, as well as the city.

After the decision by the Supreme Court of Georgia in the 106 Ga., the trustee learned for the first time that the city had not paid water rentals since 1894, and that interest on the bonds had been paid with money borrowed by the Waterworks Company of the American Pipe Manufacturing Company. The trustee received notice from the Water Company that it could no longer borrow money for the purpose of paying interest on the bonds, and the Trustee heard for the first time, after the notice had been given that the Mayor and Council had made complaint in regard to the pressure at some one of the water plugs

in the city. The Water Company made known to the Trustee its purpose not to pay any more interest. It had made arrangements to make extensive repairs and improvements of its plant, and give a better service, but after the rendition of said decision, and the action taken by the city to erect a water plant of its own, the Dawson Waterworks Company declined to go on with such repairs and improvements.

It is alleged by the city that the water service is not up to the contract, and by the Water Company that if the service is not up to the contract it is the fault of the city.

The amendment to the bill makes these allegations, and the prayer is that the Water Company be decreed to perform its agreement, and that it be enjoined from refusing to perform the service in strict fulfillment of the contract, and that the city of Dawson be enjoined from breaking and violating its contract.

The mortgage is upon the property of the Water Company and the rentals, and given to secure the payment of the bonds, and unless the contract can be protected, as prayed in the bill and amended bill, the value of the bonds will be practically destroyed.

While the contract sets out the method to be pursued by the city to be relieved of the obligations of the contract because of a failure on the part of the Water Company to live up to it, and while it is true the city has not pursued that course, and can not claim to be relieved, yet the city claims the Water Company will not perform its contract—and for this reason it was proper to make the Water Company a party defendant, and ask that it be required to perform all of its obligations under the contract.

It is for the protection and futherance of the interest of the complainant, as Trustee, that this bill is filed, and the fact that it may result in a benefit to the Water Company is in no sense a reason why said company should not be made a party defendant.

154 U. S. 362, Reagan *vs.* Farmers' Loan & Trust Co., *et al.*

This case rules that the Trustees could sue to protect property which has been mortgaged to secure bonds, and in that case the defendant railroad company filed its answer and cross bill setting up substantially the same rights as the plaintiff.

There is equity in the bill. The complaint is of such conduct as will, unless arrested by the Court, result in the destruction of the complainant's rights.

172 U. S. 1.
118 U. S. 290, 2 H. N.
169 U. S. 466, Smith *vs.* Ames.

Specific performance is prayed for in this case. Specific performance will not be refused, because the contract is continuous, and in its execution judgment and skill will be required.

163 U. S. 564, 8 H. N.
138 U. S. 1, 13 H. N.

Justices Shiras and Gray dissented in the last case, but on another point.

The same doctrine is strongly stated by the Kentucky Court of appeals, reported in 41 S. W. 1015.

See also a decision to the same effect by the Supreme Court of Alabama, reported in 13 Southern R. 682.

XVI.

Appellant contends that there is no diversity of citizenship. This contention is sufficiently answered, we think, by the pleadings and evidence, which show that the Trustee, a corporation existing under the laws of Pennsylvania, has its residence and citizenship within that State—and all the defendants are residents and citizens of the State of Georgia.

This alleged lack of diversity of citizenship proceeds upon the idea that the Water Company should be a party complain-

ant. This contention is answered in the fifteenth division of this brief, and in support of this allegation it is insisted that this is a collusive suit.

This contention is successfully answered by the evidence in the case.

The Trustee did not know, nor did any of the bondholders know, that any litigation was going on. The interest was promptly paid as it fell due, and they thought it was being earned by the property, and that the city was promptly and regularly paying the rentals called for by the contract. Now that the city's continued violation of its contract has so crippled the waterworks company that it can no longer make repairs, or meet interest payments, the Trustee is advised of the facts, and takes steps for the protection of the mortgaged property, in order to save bondholders security from destruction. This it had the right to do, and this it is its duty to do. If the Dawson Waterworks Company should feel friendly to the suit, it could make no possible difference. If they had joined as co-plaintiffs it would make no difference. Under the decision of this Court in the Walla Walla case, supra, the Waterworks Company, if so inclined, could have maintained the suit, or one similar to it. But the Trustee can do one thing the Dawson Waterworks Company could not do. It can ask the Court to expend the earnings, or if need be place a prior lien upon the property, to make repairs and betterments, as may become necessary. The Waterworks Company has declined to act, and it thereby becomes the right and duty of the Trustee to take action to protect the contract and the property, and force both parties to perform the contract.

See authorities cited in the fifteenth division of this brief.

The United States Courts would have jurisdiction of a suit brought by the Waterworks Company, seeking the relief that is sought in the original and amended bill in this case, to the extent of enjoining the City of Dawson from breaking its con-

tract, for a federal question is raised by the pleadings and the pleadings are supported by the evidence.

90 Fed. 753.
172 U. S. 1.

XVII.

The Appellant contends that the decision by the Supreme Court of Georgia, in 106 Ga. supra, concludes the rights of complainant, because the complainant was an original party to the contract, and that the Dawson Waterworks Company transferred the claim of rentals to the Trustee after said decision was made.

It is true that the Trustee is, and was, a party, to a certain extent, to the original contract. The city agreed to pay the water rentals to either the Water Company, or to the Trustee for its bonds—*i. e.* pay to either that might demand them—but the trustee was not a party to that suit, and was in perfect ignorance that there was, or had been, any controversy or litigation between the City and the Water Company until after said decision had been made. We think, for the reasons set out in the eleventh division of this brief, that the rights of complainant are not concluded by that decision.

There was no transfer whatever by the Water Company of any right it had to the trustee after said decision had been made by the Supreme Court of Georgia. There was never at any time, a transfer of any right by the Water Company to the Trustee, except such right of the Water Company that belonged to the Trustee in virtue of, and as an incident to, the mortgage.

The contract between the City and the Water Company contains a stipulation as follows:

"The City obligates itself to pay to said company, or to such trust company as the Dawson Waterworks Company may elect, or decide upon, as trustee for their bonds," etc.

Here is a distinct promise to pay to complainant, who became trustee for the bonds of the water company, and this obligation on the part of the City of Dawson is in no sense an assignment of any interest of the Water Company to complainant. This stipulation required the City of Dawson to pay direct to the trustee, if payment to the trustee should be demanded, and it was made for the purpose of enabling the trustee to demand the rentals for the protection of the bonds, whenever, in the judgment of the Trustee, it should become necessary to do so. This stipulation, in effect, makes the City of Dawson a party to the bond issue—for it solemnly promised that it would pay the rental to the trustee *for the bonds*. This stipulation authorized the trustee to notify the City of Dawson that it claimed and demanded payment of rentals in each year for the years 1896, '97 and '98, and for future years, and the fact that the Water Company acquiesced in that demand is no evidence of a transfer or assignment by the Water Company of any right it had in the rentals to the trustee.

The water rentals fall due annually as the water is furnished, and the rentals for each year could be sued for in separate actions, there would be a separate cause of action for each, or a suit could be brought for rentals for any number of years within the statute of limitations. Under the provisions of this contract, either payee would have a right to demand and receive the money—the payment of rentals to either would satisfy the contract—but a suit by one payee for the rental of 1895 does not prevent the other from suing and recovering for subsequent years. An adverse judgment against one alternative payee, in a suit for the rental for one year, could not be successfully plead in defense of a suit by the other payee for the rentals for other years, if such other payee was not a party to the first suit.

2 McLean, 139, and authorities cited in eleventh division of this brief.

XVIII.

But aside from the stipulation in the contract, which gives the Trustee the right to receive the rentals direct, the Trustee can prosecute this suit to protect the bonds secured by the mortgage on the property, and it is his duty to do so.

84 Fed. 369, Consolidated Water Co. *vs.* City of San Diego.

76 Fed. 296, Louisville Trust Co. *vs.* City of Cincinnati.

63 Fed. 213, Bowden College *et al. vs.* Merritt.

154 U. S. 362.

And the Trustee could prosecute its suit to protect the property covered by the mortgage, even though the water company, the mortgagor had placed itself in a position where it could not sue, for a udgment against the mortgagor can not be plead as an estoppel against the mortgagee, unless the mortgagee was a party to the suit.

Our contention is, first, that there has not been rendered by the Georgia Courts any judgment which would estop the Water Company from making the federal question that is made by the bill and answer in this case, were that company the complainant in this bill.

Second, that the trustee can sue regardless of any judgment or decision, touching the rights of the Water Company, in any suit to which it was not a party—and this the Trustee can do, in its right as alternative payee, or in virtue of its right as mortgagee, or in both rights.

See authority in eleventh division of this brief.

XIX.

Appellant contends that the Court erred in enjoining the collection of a city tax, or license fee, on the ground that the

contract in so far as it provides for "the remission of license fees, taxes, dues and claims, in consideration of water to be furnished to the public municipal buildings and two public fountains," is contrary to the constitution and laws of Georgia, and is void.

The contract in this respect is not void. The price of the water to be furnished to the municipal building and to two public fountains was estimated to be of equal value to city taxes on the property and the license tax required of other persons doing business in the city.

Such a contract has been held to be valid by the courts of Georgia. It has been decided by the Supreme Court of Georgia that a contract of this kind is lawful if the value of the water furnished is a fair equivalent for the taxes that should be paid on the property.

This question can be settled, if need be, on the final trial of the case. But no proof has been submitted to show that the Circuit Judge committed error in restraining the present attempt by the city to collect taxes.

XX.

It is alleged in several assignments of error, that the trustee has a remedy at law. It is true that the trustee might sue and recover at law for the years in which the city has used the water of the water company, but the relief sought—the protection of the property upon which a mortgage was given to the trustee to protect the bonds—can not be had in an action at law. Under the decision of the Supreme Court of Georgia, the City may end the contract at any time by refusing to be bound by it and ceasing the use of the water. The city has made known its purpose to do so by a solemn ordinance—and it was taking steps to erect waterworks of its own when the temporary injunction was granted by the Circuit Judge. If the city is not permanently enjoined from doing these things, it will cease to take water, which it has contracted to take—destroy the con-

tract—and under the decision of the Supreme Court of Georgia, there could not be any further recovery for water rents.

The right to sue in equity is clear:

169 U. S. 466-550.

XXI.

The question of having waterworks was submitted to the qualified voters of the City of Dawson, and practically all the votes cast were for waterworks. It is contended that the notice was not sufficient, and it is also contended that there is no statute law of the State, either in the charter of the city, or in the general law, which provides for an election to sanction a contract which creates a debt—that the only law of that character in Georgia relates to the issue of bonds.

Our reply is, even if the contract in question created a debt, yet the City of Dawson is estopped from setting up that defense.

The American Pipe Manufacturing Company, who bought the contract with the City of Dawson from Bennett, made a careful investigation of the contract, the locality, the water supply, etc., before purchasing. This company wished to float bonds to raise money with which to build the waterworks—a fact made known to the City of Dawson—and in order to enable the Pipe Company to arrange for floating the bonds, the City of Dawson was requested to extend the time of completion, which was done.

There is no pretense that any one was misled; and there is nothing in the record to show that the public did not know that the contract for water rent was made pursuant to the vote previously taken.

The contract was made, and the company was engaged for a year or more in erecting the plant, laying pipes, etc., in the streets, at a large cost, which facts will be presumed to have been known to every taxpayer in the City of Dawson, nothing

appearing to the contrary, and during all this time no complaint was made by any taxpayer. They should have complained before this large expenditure of money by the water company on the faith of this contract.

Before consenting to act as trustee, through its president, the trustee investigated the prospects of the contemplated water company. Both the agent of the Pipe Company and the president of the trustee talked with the officials and citizens of Dawson, and all were strongly in favor of the contract; no one opposed it.

In view of all the evidence in this case, and the contract to pay rentals to the trustee, the City of Dawson is estopped, after the issuance of the bonds, to which it practically became a party as herein set out, from asserting that its contract with the water company is invalid.

Com'rs of Knox Co. *vs.* Aspinwall, 21 Howard (U. S.) 539.

Bissell *vs.* Ciy of Jeffersonville, 24 Howard (U. S.) 287.

New Haven, etc., R. R. Co. *vs.* Town of Chatham, 42 Conn. 465.

This case also decides that the mode of voting is immaterial if the town knew of the mode that was adopted, and made no objection until after contractors expended labor and materials on the faith of the result.

Allegheny City *vs.* McClurkan & Co., 14 Penn. State 81. (Strong case.)

San Francisco Gas Co. *vs.* San Francisco, 9 Cal. 453.

Hackett *vs.* City of Ottawa, 9 Otto (U. S.) 86.

Board, etc., of Anderson Co. *vs.* Beale, 113 U. S. 227.

Town of Oregon *vs.* Jennings, 119 U. S. 74.

The two last named cases decide that the city and inhabitants may be estopped from setting up that a constitutional or statutory requirement that a contract shall not be made without the vote of the people had been disregarded.

The citizens of a municipal corporation may ratify the unauthorized acts of their agents, and when the official agents exceed their authority, the inhabitants composing the corporation will nevertheless be bound, if by their silence or representations, they permit contracts to be entered into which involve others in onerous engagements.

A corporation, quite as much as an individual, is held to a careful adherence to truth in their dealings with mankind, and can not by their representations or silence, involve others in onerous engagements, and then defeat the calculations and claims which their own conduct had superinduced.

9 Otto (99 U. S.) 86, Hackett *vs.* City of Ottawa.

14 Penn. State 81, Allegheny City *vs.* McClurkan & Co., 83, 84, 85.

76 Fed. 271, Illinois Trust & Savings Bank *vs.* City of Arkansas City.

The doctrine of estoppel is applicable to the case of a city or county setting up that an indebtedness was incurred without constitutional or statutory authority, by reason of not having received the assent of the qualified voters as required by the constitutional or statutory authority.

113 U. S. 227, Board, &c., of Anderson Co. *vs.* Beall (5).

119 U. S. 74, Town of Oregon *vs.* Jennings.

The same rule of estoppel is applied to a city by the Supreme Court of Georgia in case of a bond issue.

52 Ga., pp. 625, 630.

And in a case where a town voted to establish schools, it was held that no infirmity in the law, under which officers acted, or irregularity in the election, would avail after the expense of establishing schools thereunder had been incurred.

86 Ga. 605.

In the decision of the case of City of Dawson *vs.* Dawson Waterworks Company, 106 Ga., it was held that the rule of estoppel did not apply as between the parties in that case—there being no other party than the two named above before the Court. The Court said:

"The contest in the present case being between the original parties to the contract, and no negotiable instrument ever having been issued, the law in relation to the innocent holders of such instruments had no application whatever."

In the case at bar there is another party—the trustee for the bonds—and the contract hereinbefore referred to, and set out in the pleadings, practically makes the city a party to the bond issue. The contract is to pay direct to the trustee the rentals, the protection of the bonds, *i e.*, pay the interest on the bonds. This, we think, makes the city a party to the bond issue, as effectually as the case would be had the city issued the bonds direct. Under the decision of the Supreme Court of Georgia, the city is estopped from making the present defense against the trustee.

But we do not wish to be understood as conceding that this question of estoppel will, or should, be applied to this case according to the decision of the Georgia courts. For the application of the doctrine of estoppel to the facts of a case is a matter of general law, that this Court will decide for itself.

We contend that the city is not only estopped from setting up such defense against the complainant in this case, but should also be estopped were the Dawson Waterworks Company the party complainant in the case, as the law of estoppel will apply as well to an effort to break the contract with the water company, under the facts of this case, as it would to protect the holders of bonds, had the City of Dawson issued bonds. And such is the meaning of the decisions of the United States Courts hereinabove cited.

76 Federal R., 271—15th h. n.

XXII.

Further on the question of estoppel: It will be conceded that the city had the authority to make this contract under the "general welfare clause" of its charter. See authorities cited in the sixth division of this brief. If it were true that the contract created a debt, it is also true that the City of Dawson had the power to create a debt, the constitution did not confer this power upon the city, but prescribed the manner of exercising that power.

The constitution makes no provision for taking the sense of the qualified voters on the subject of creating a debt.

The Legislature passed an act for ascertaining the wishes of the qualified voters in respect of issuing bonds; but that act in terms applies to bonds, and can not be construed to be applicable to a contract of this kind.

Therefore, if the contract creates a debt, and the assent of the qualified voters is to be had, there is no provision in the general law of the State which prescribes the mode of ascertaining such assent, and the city had to furnish the mode.

As to the law generally on this subject, Dillon says: "Where a corporation has the power to act, and no method or mode of action is prescribed, it acts within its discretion."

Dillon, 4th Edition, section 94.

But more in point is a decision of the Supreme Court of Michigan, 76 N. W. 159, 2 h. n., wherein the court say:

"Where the law is silent as to notice, the common council possesses the authority to prescribe the method of notifying the electors."

Our contention is, that the only law which prescribes the method of submitting to a vote of the qualified voters of a city the question of creating a debt relates in terms to bonds. The Legislature has not seen proper to go any further in that direction, and where any other kind of debt is to be created, the

city authorities may submit the question to the qualified voters of the municipality in such manner as they may deem best, which will fairly test the sense of the voters thereof.

As the reckless issue of bonds by municipalities led to the constitutional restriction, the Legislature did not deem it necessary to do more than provide by statute for taking a vote on a proposition to create a bonded debt, leaving the mode and manner of giving notice and taking a vote in respect of all other kinds of indebtedenss to be provided by the municipal authorities.

In this case a vote was had on the question, "shall the city incur the expense of waterworks," and it is admitted that two-thirds of the qualified voters of the city voted to incur the expense.

The fact that the vote was taken on the proposition, "shall the city incur the expense of waterworks," did not prevent the municipal authorities from making a contract for water rent pursuant to that vote.

Broadnax *vs.* Groom, 64 N. C. 244.

Although the vote was on the question of incurring the expense of waterworks, yet the thing the city, and the voters, wished was water, they cared nothing for waterworks.

Some two years after this vote as taken, the contract in question was made, which provides for an annual water rental. The city got water. For more than a year the company was engaged in laying pipes in the streets, erecting hydrants, etc., with the knowledge of all the inhabitants of the city. The works were completed, the city and the inhabitants were supplied with water, a tax levy was made in each year to pay the rental, the tax rate was increased for that purpose, yet no man up to this hour has complained that he was ignorant of the fact that a contract had been made for water rent, and that it was made pursuant to that vote.

In the absence of any statute law regulating the giving of

notice of an election of this kind, that notice is sufficient which apprises the voters of what the authorities propose to do.

The notice in this case apprised the qualified voters of Dawson that the town wished to incur the expense of procuring water. It was not necessary to state in the notice the price to be paid, nor the length of time for which the contract should run, if the qualified voters were apprised of what was proposed, or were willing to leave that matter to the authorities, and we must conclude from the absence of any proof in the record to the contrary, that they knew the terms, or were willing to leave that matter to the discretion of the city authorities.

So we insist that the city would be estopped, under the evidence in the case, from making the defense that the contract is void under the constitution and laws of this State, even if the contract in question created a debt. 76 F. R. 271, 15th head note.

It will be conceded that there is no constitutional or statutory provision in Georgia, which prescribes the manner of conducting such elections by a municipality.

This being true, it is a matter of general law, and the United States Court can decide for itself whether there was an election held in the city of Dawson, and also as to the validity of that election.

XXIII.

(1) We contend that the Constitution of the State which inhibits the passage of a law giving irrevocable grants, etc., does not apply to a city which makes a contract for a water supply, and grants the exclusive right to the use of the streets by the company with whom it contracts.

(2) But if such inhibition does apply to an exclusive grant to use the streets of a city, then the constitutional provision hereinbefore referred to prohibits the withdrawal of such exclusive grant except in a way that will protect the interest of the water company and its bondholders, which has not been done, or attempted to be done, by the City of Dawson in this case.

(3) Without regard to whether the city could give to the water company the exclusive right to use the streets for its mains, pipes, etc., we contend that the contract made by the city with the water company binds the city to take its supply of water for the period of the contract from the Waterworks Company and from no other source.

(4) The contract in the case was in the shape of an ordinance, as will be seen by reference to Record page 288, and there was an attempt on the part ofthe city to revoke this contract without giving any reason whatever therefor. See Record bottom of page 318 and top of page 319. We insist that it was not in the power of the city to revoke a contract thus entered into. It is not a mere breach of contract by failure to pay water rentals, but it is a distinct effort to revoke the same, *i. e.*, annul it. The action of the Mayor and Council of the City of Dawson as set out in the record in proceeding by an election for the issue of water bonds to build its own waterworks, and notice to the Water Company that it would not carry out the contract with the Water Company, is a distinct effort to revoke the same and erect waterworks of its own, thus bringing the contract in this case squarely in line with the contract between the City of Walla Walla and the Walla Walla Waterworks Company. 172 U. S. *supra.*

(5) The City of Dawson, without any special legislation authorizing it to do so, had, under the general welfare clause of its charter, the power to make a contract by ordinance for a supply of water either by erecting waterworks of its own or entering into a contract for a supply of water with a water company. This power can not be doubted. See authorities cited in our brief on this subject. Having such authority, and having entered into a contract with the Dawson Waterworks Company for a term of years, its effort to revoke the contract is a distinct impairment o fthe obligation of the contract, and raises the federal question in this case.

(6) The allegations in the bill were established by the proof on the hearing before the Master. See Master's Report, beginning on page 76 and ending on page 116 of Record. This being true, the Trustee of the bonds of the Waterworks Company was entitled to a decree for specific performance on the facts in the cause, and under the authorities cited in this brief.

XXIV.

It is argued in behalf of appellant that the construction placed by the Supreme Court of Georgia upon the meaning of the term "debt," as contained in Article 7, Section 10, Paragraph 1 of the Constitution of this State, should be followed by this court, irrespective of its own views as to the correctness of the conclusions reached by the court and the soundness of the reasoning by which such conclusions were reached, notwithstanding the factthat the rights of the water Works Company and of complainant originated in a contract entered into in good faith long before such decision of the State court was rendered, and at a time when not only by the current of authority in other States, but by the reasoning adopted in decisions rendered in our own State, parties whose rights have accrued under that contract had the right to regard the contract as valid and binding.

It is conceded by the Supreme Court of Georgia in the decision of March 4, 1899, "that the ruling which we make in the present case is in direct conflct with the decision of the highest court in the land, as well with the current of American authority on the subject." (106 Ga., 714, supra.) It is practically conceded by apellant that, tested by the unanimous decision of this court in a well considered case (Walla Walla *vs* Walla Walla Water Co., 172 U. S., I.) and by the decisions of nearly every court, except our own State court, ~~that~~ constitutional and statutory provisions substantially similar and many of them in almost precisely the same words with the provision contained in our own Constitution, and which our own State court and

counsel for appellant alike concede are not to be distinguished by any difference in their wording, the contract in the case at bar is not a contract creating an indebtedness within the inhibition contained in the Georgia constitution. The brief in behalf of apellant does not attempt to combat the soundness of the reasons advanced in the Walla Walla case, and other similar decisions in support of the conclusions there reached.

The position taken by counsel for appellant, as stated in their brief, is as follows:

> "We are willing to concede to the citation the weight of argument therein contained, and that the same chain of reasoning might lead the court to a similar conclusion in this case, provided the *manifested policy of Washington* is the same as that of Georgia; but we can not admit that the decision in that case precludes us from asking this court to determine the issue presented here in accordance with the Constitution of the State under which it arose, it having held that different interpretations may be given in different States to laws even of a common prototype."—(Brief for Appellant, page 117.)

And while appellant's counsel recognize that in an extreme case this court may be constrained "by exasperating conditions to reject the conclusion of State courts," yet nothing less than such "exasperating conditions" will justify the court in refusing to accept as controlling decisions of the State courts, rendered after contract rights have vested and when the effect of following such subsequent decisions will be to destroy vested contract rights and deprive persons of their property dependent, for its value, upon the continued existence of such contract rights.

The Constitution of the United States is the supreme law. The rights safeguarded by that instrument are within the protection of the courts of the United States, and the courts of the United States are charged with the responsibility of determining for themselves both as to the existence of the right which it is claimed that the Constitution protects, and as to whether the action complained of is in violation or attempted impairment of

such right. The courts of the United States can not evade this high and responsible duty.

> "When a contract is asserted and the Constitution of the United States invoked to protect it, all of the elements which are claimed to constitute it are open to examination and review by this court; and also all that which is claimed to have taken it away."—(192 U. S. 73, Citizens Bank *vs.* Parker.)

In the case of Shelby County *vs.* Union & Planters Bank, 161 U. S. 149, the court say:

> "In such a case as this, where we are to construe the meaning of the clause of the statute as to what contract is contained therein, and whether the State has passed any law impairing its obligation, we are not bound by the previous decisions of the State courts, except when they have been so long and so firmly established as to constitute a rule of property (which is not the case here), and we decide for ourselves independent of the decisions of the State courts, whether there is a contract and whether its obligation is impared. (Citing) Louisville & Nashville Railroad *vs.* Palmes, 109 U. S. 244 256; Vicksburg etc., Railroad, *vs.* Dennis, 116 U. S. 665, 667; Mobile and Ohio Railroad *vs.* Tennessee, 153 U. S. 486, 492." (161 U. S., Shelby County *vs.* Union & Planters Bank, page 151 of the opinion.)

And the court further say:

> "While according to the decisions of the Supreme Court of Tennessee the respect which is most justly due it on account of the high character of that tribunal, nevertheless the responsibility is upon us to determine the question independently, and we can not agree with that court in its construction of the decisions of this court in the two cases mentioned." (*Ib.* 161 U. S. page 151.)

In the first case cited in the portion of the opinion above quoted, namely, Louisville & Nashville Railroad Company *vs.* Palmes, 109 U. S. 244, the court say:

"The question we have to consider and decide is, whether, in the judgment under review, the Supreme Court of Florida gave effect to a law of the State which, in violation of the Constitution of the United States, impairs the obligation of a contract. In reaching a conclusion on that point, we decide for ourselves, independent of the decision of the State court, whether there is a contract, and whether its obligation is impared; and if the decision of the question as to the existence of the alleged contract requires a construction of the State Constitution and laws, we are not necessarily governed by previous decisions of the State courts upon the same or similar points, except where they have been so firmly established as to constitute a rule of property. Such has been the uniform and well settled doctrine of this court." (Louisville & Nashville Railroad Co. *vs.* Palmes, 109 U. S., page 256 of the opinion.)

And the court cite in support of this opinion,

16 Howard, 416, 432.	Ohio Life Insurance & Trust Co. *vs.* DeBolt.
1 Black, 435.	Jefferson Branch Bank *vs.* Skelly.
1 Wallace, 116.	Bridge Proprietors *vs.* Hoboken Co.
107 U. S., 20.	Burgess *vs.* Seligman.

The same rule exists where jurisdiction is founded upon diversity of citizenship, but where during the progress of the case contract rights are to be passed upon, which accrued before decisions of the State court touching the validity or construction of the contract were rendered.

"The object of giving to the national courts jurisdiction to administer the laws of the States in controversies between citizens of different States, was to institute independent tribunals which would be unaffected by local prejudices and sectional views, and it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication." (193 U. S. 532, Great Southern Fire Proof Hotel Co. *vs.* Jones), citing, Burgess *vs.* Seligman, 107 U. S. 20.

"Without qualifying the principles that in all cases it is the duty of the Federal court to lean to an agreement with the State court, where the issues relate to matters depending upon the construction of the Constitution or laws of the State, and that the Federal court is bound to accept decisions of the State courts construing State statutes rendered prior to the making of the contract on which the cause of action is based, such duty does not exist in regard to decisions of the State court rendered after the cause of action has arisen, although before the action itself was commenced, when the Federal court in the exercise of its independent judgment reaches a different conclusion from the State court." (Ib. 193 U. S. 532.)

In that case the court say:

"In our opinion, neither the decisions of Palmer *vs.* Tingley, Young *vs.* Lion Hardware Co., 55 Ohio St., 423, nor any other case in the Supreme Court of Ohio precluded the Circuit Court from exercising its independent judgment as to the constitutionality of the statute of Ohio herein questioned. If prior to the making of the contracts between the plaintiffs and McClain, the State court adjudged that the statute in question was in violation of the State Constitution, it would have been the duty of the Circuit Court, and equally the duty of this court, whatever the opinion of either court as to the proper construction of that instrument, to accept such prior decision as determining the rights of the parties accruing thereafter. But the decision of the State court, as to the constitutionality of the statute in question, having been rendered after the rights of parties to this suit had been fixed by their contracts, the Circuit Court would have been derelict in duty if it had not exercised its independent judgment touching the validity of the statute herein questioned. In making this declaration, we must not be understood as at all qualifying the principle that in all cases it is the duty of the Federal court to lean to an agreement with the State court where the issue relates to matters depending upon the construction of the Constitution or laws of the State." (Ib. 193 U. S., pages 547, 548 of the opinion.)

The opinion delivered by Mr. Justice Harland for the entire court (except Mr. Justice White, who did not hear the argu-

ment and took no part in the decision) contains such a lucid statement of the true rule and the reasons upon which the same is based, that it leaves, we think, nothing to be added to this branch of the discussion.

The principal cases bearing upon the subject are referred to in a note to Burgess *vs.* Seligman, 107 U. S., on pages 34 and 35. The ~~elder~~ more recent cases have all of them followed Burgess *vs.* Seligman, 107 U. S., 20, *supra*.

XXV.

The appellant contends that the interpretation recently adopted by the Supreme Court of Georgia of the meaning of the term "debt" as used in the State Constitution, should be, by reason of local State policy, given a different meaning from what the language would naturally suggest, or from what would be its import according to the usual standard and tests of interpretation. And the Supreme Court of Georgia, in announcing a decision which the court recognized was "well-supported by reason, as well as by the current of American authority," seem to argue that there was something peculiar in the conditions existing in Georgia at the time the constitution of 1877 was adopted, and the years immediately preceding that date, which call for an interpretation of the words used different from the meaning which they would otherwise most naturally bear. We think, however, that an examination of the opinion in that case will fail to convince this court that any such reasons are shown.

An examination of the earlier decisions must convince the court that what the framers of the Constitution really had in mind was to forbid that system of "municipal aid" by which municipalities had been permitted to incur large bonded indebtedness in the giving of aid to railroads supposed to be of local benefit. That was the evil which existed prior to 1877, and bonded indebtedness would seem to have been what was aimed at. The Constitution intended to inaugurate the "pay as you go" policy, by which the future should not be burdened with

debt for what was consumed or wasted in the present. It does not appear that any of the cities or villages in the State had been extravagant in expenditure for water, lights, or other necessaries constituting the legitimate and ordinary expenses of a municipality. It must appear to the court as at least a little novel that if the recent decision is to be founded on public history our court seems not to have reached that conclusion until 1899, twenty-two years after the constitution was adopted, and Mr. Chief Justice Simmons, the only member of the court who was a member of the constitutional convention which framed the Constitution of 1877, or who was old enough to have a personal acquaintance with the political questions of that day, concurs in the opinion only because he feels himself bound by the decision rendered by the court when the same case was before the court the first time (102 Ga. 594, Mayor and Council of Dawson *vs.* Dawson Waterworks Company, where the decision of the court was based upon a record which did not bring up the full contract), and states:—

> "If it were an original question, I should hold, in accordance with nearly all the other courts of the Union, including the Supreme Court of the United States, when construing similar provisions of constitutions or statutes, that the making of the contract or agreement by municipal authorities for the supply of gas or water for a term of years, for a certain sum to be paid annually, is not a debt within the meaning of the Constitution. It is difficult for me to understand ~~how~~ about, after full argument and reflection, the making of the same contract by the same authority for one year, when there is no money in the treasury to pay it and tax is to be levied to meet the obligation, is not a debt, when if the same authority makes a contract for the same purpose for two years, or five years, it is a debt." (106 Ga., City of Dawson *vs.* Dawson Waterworks Company, opinion of Mr. Chief Justice Simmons, on page 737.)

The provision in the Georgia Constitution seems to have been copied, with slight and wholly immaterial change, from the Constitution of the State of Iowa, which, according to the interpre-

tation uniformly placed thereon by that Court, did not embrace within the term "debt" contracts of this character and description. In fact, it was not until the decisions in the Cartersville cases, 89 Ga. 683, 689, rendered in August, 1892, that our State court read into the Constitution a distinction between contracts for water or gas supplied on the credit of the city for one year, and contract for such supply for a longer period than one year, classifying the former as not falling within the meaning of the term "debt," and the latter as falling within that category.

It is ~~difficult to see~~ impossible to ascertain by what course of reasoning the court arrived at this distinction, as these two cases are what is known in our State as "Head Note" decisions, there being no written opinion by the court further than a brief statement or synopsis of the points ruled. No authorities are cited, but we think that the only authorities which could be found for such a distinction, and which the court probably came upon, were the decisions in two or three States based upon charter or statutory provisions forbidding a municipal corporation to incur any liability or expenditure in any year beyond the revenues arising out of taxes actually levied for such year, the court holding that such limitation inhibited a contract for expenditure for future years in advance of its being known what would be the revenues, or the amount of the expenditures for such years. We know of no authority outside of Georgia drawing this distinction with respect to the meaning of the term "debt." The decision in the Cartersville cases is one which our own court did not again follow until the decision in the Dawson Waterworks case, 106 Ga. 696, decided March 14, 1899. The Court, during the nearly seven years that had elapsed, had more than once an opportunity to restate the ruling in the Cartersville cases, but were not prepared to do so. In Dawson Waterworks *vs.* Carver *et al.* 95 Ga. 565, being a bill brought by tax-payers to restrain the City of Dawson from paying the Dawson Waterworks Company hydrant rentals for water used during the first half of the year 1894, the trial court refused to grant the injunction *pendente lite*, but in the order refusing the injunction declared that the city might have leave, if so desired, to treat the contract as a

contract valid only for the remainder of the current year and refuse to pay after that time. This decision being taken to the Supreme Court, that court could very well have settled the entire controversy by adhering to the ruling in the Cartersville cases, and affirming the decision of the court in toto. The Court held, however:

> "That there was no error in refusing to enjoin the payment by the city for water it had already consumed whether the contract between it and the Waterworks Company for the full period contemplated thereby was valid and binding upon the city or not."

But the court directed that so much of the order passed by the trial judge as might affect the right of the Waterworks Company to insist at the final hearing that the contract was valid for the entire period, should be stricken from the order, and that the parties should have the right to present that question at the final hearing. 95 Ga. 565, Dawson Waterworks Co. *vs.* Carver.

In the case of Dawson *vs.* Dawson Waterworks Company, 102 Ga. 594, the same questions were made that were made before the court the last time, and both parties asked for a decision on the merits. The court, however, found that they were able to dispose of the case without deciding this question, and did so. 102 Ga. 594.

As to this decision, the court say, in their later decision in 106 Ga. 735:

> "There is nothing in our present ruling which conflicts with this decision (102 Ga. 594). Upon an investigation of the case as then presented, it was found that one absolutely essential element necessary to constitute a cause of action was wanting, and the case was reversed because the direction of a verdict for the plaintiff was erroneous for that reason. There was no ruling made on any of the questions now decided, although such questions were made in the record."
>
> 106 Ga. 735.

And when the case came before the court the last time, the court was still unprepared to follow the Cartersville cases, and after holding the matter in abeyance from October 22, 1898, to January 30, 1899, a reargument was made on the court's own motion, and by reason of the difficulty in which the court found itself placed by the conflicting decisions which had been rendered.

The question has not again come before the court, but as pointed out by the Master in his report, the reasoning subsequently adopted by the court in the case of Epping *vs.* City of Columbus, 117 Ga. 263, is inconsistent with the reasoning adopted by the court in the opinion in 106 Ga. 696, the Dawson Waterworks case just referred to, and the conclusion can not be reconciled with the conclusion reached in that case. It will be seen that the decisions cited by the court in support of their conclusion in Epping *vs.* Columbus are decisions of the very same courts, and based upon the same reasoning, and sustained by the same authorities, which our State Court refused to follow in the Dawson Waterworks case.

We do not concede that in the interpretation of contracts the decisions of the State Court rendered after the contract, which is sought to be impaired, is entered into and rights have vested thereunder, are to be regarded by this court as binding upon the theory that the interpretation by the State Court of its own State laws as a matter of local policy and local concern, ~~to which~~ and not merely the rights of innocent persons who have acquired contract rights based upon what the State laws would mean according to a sound and natural interpretation are to be sacrificed.

It was the purpose of the Constitution to preserve the right of contract against the impairment and destruction according to the varying and fluctuating views which the court or legislature might adopt as to local or sectional policy. A person in Pennsylvania or New York would not be willing to enter into a contract, and embark his money in building up enterprises in Georgia or Washington if his contract must stand or fall, not according to its validity under the laws then of force according to the natural and sound rules of interpretation, and such settled course

of decisions as might properly be regarded as a part of the law itself, but according as the State court might incline to one view or another according to that vague, fluctuating and wholly uncertain standard intimated by the Supreme Court in the decision in the Dawson Waterworks case, and adopted by counsel for appellants, namely, local views, local policy, local sentiment seeking to find support for themselves in local State history, But for the supposed necessities of local policy and its influence ~~upon~~ retroactively local legislation and local courts, it perhaps would not have been found necessary to elevate the obligations of contracts above the protection to be found in State constitutions and statutes and the administration of justice in State courts. The sound interpretation of contracts, unbiased by local, narrow, and sectional views, the rigid adherence to rules requiring good faith in their performance, are the foundations upon which have been built the greatness of our American nation. The protection afforded by the Federal Constitution against the impairment of contracts is something more than the basis of our commercial and industrial unity as parts of one great nation; it preserves and safeguards good faith and fair dealing, and serves to perpetuate at all times, and in all places, and under ~~divers~~ local and temporary conditions, that individual and personal honesty and integrity in business dealings, without which no people can permanently enjoy the blessings of prosperity and liberty.

XXVI.

As a part of the relief prayed by the bill and awarded by the decree, the complainant has recovered against the city hydrant rentals from the beginning of the year 1896 up to the time the decree was rendered, with interest thereon.

(The bill did not ask to recover hydrant rentals for 1895, or the amount of hydrant rentals retained by the city under its claim for back taxes.)

It is the city's contention that there ought to have been no

recovery of these hydrant rentals by the trustee. We think there is no merit in this contention.

Without the city's consent, the Water Company had the right to mortgage its property, including these hydrant rentals, and to stipulate, either at the time the mortgage was made, or at any time thereafter, that the mortgagee should have the right to collect these hydrant rentals. The right to pledge and mortgage is an incident to the right of owning property. Promises to pay money are property and may be mortgaged. It is well settled that a corporation may mortgage its future acquired property and its future income, even though the contract out of which the income is to arise is not yet in existence. In the case at bar, however, it certainly does not lie in the city's mouth to object to the Water Company's right to pledge its income to secure the bonds. The city knew that the money with which the waterworks were to be constructed was to be obtained by the issue and sale of bonds. By ordinance it enlarged the time for beginning the construction of the works, in order to give the owner of the contract time to market its bonds. To offer inducements to persons to purchase the bonds, it is stipulated in the ordinance which constitutes the contract that the city shall pay the hydrant rentals to "said company or such trust company as the Dawson Waterworks Company may elect or decide upon as the trustee for their bonds." Before the mortgage was actually given, the President of complainant company came down to Dawson with a view to looking into the situation before complainant was willing to undertake to act as trustee, and the Mayor and Council in a body received him, and pointed out the different features which made the bonds of the Company attractive and desirable securities, and actively aided in inducing the Trust Company to handle and recommend the bonds to their customers.

The bonds were recommended and purchased largely on the strength of the inducements held out by the mayor and council to the Trust Company, represented by its president.

The mortgage in express terms conveys these hydrant rentals not only to secure the interest but to secure the principal of the mortgage bonds. A mortgagor may always pay the debt before

the maturity, with the consent of the creditor. The mortgagor may turn the property or any part of it over to the creditor to enable him to collect his debt. When the city by its conduct had so impaired the mortgage security as that the same was no longer sufficient to cover the mortgage debt, surely it will not be contended that the debtor had no right to make his creditor's loss as small as possible by turning over to the creditor the hydrant rentals, whether the same had been already collected or were yet to be collected, the hydrant rentals so turned over being themselves a part of the mortgage security. The city is not a creditor, and it is hard to see what concern it is of the city's as to what the Water Company may see fit to do with its hydrant rentals. It could not use the same for any more legitimate purpose than to pay its debts.

There were other good reasons why the Water Company should turn over to the trustee for the bondholders all such right and title as remained in it to these hydrant rentals. By the city's wrongful act and course of conduct in repudiating its contract, the Waterworks Company had been placed in a position where it was no longer able to raise the necessary revenues to enable it in future to carry out its contract with the city, and thereby conserve the property mortgaged to secure its bonds. It was proper that the bondholders being placed where it might be necessary for their trustee to pay out money in making such extensions and betterments as become necessary after a lapse of time should be reimbursed and saved harmless, as far as possible, against such burdens and necessary expenditures by having turned over to their trustee the right to these past due hydrant rentals, as well as the hydrant rentals that should fall due in the future. The trustee having received the hydrant rentals was placed in a position such that betterments could be erected whereby the service was substantially improved. The city having complained that the old stand pipe was become leaky, and that the pressure was thereby affected, seven thousand dollars was expended in erecting a new stand pipe of twice the capacity of that called for by the contract, forty feet higher than that re-

quired by the contract constructed of steel and of the most substantial character, and it is undisputed that since that time the pressure has at all times been considerably in excess of the contract requirements throughout every portion of the system. This was erected under an amendment by which it was asked that the hydrant rentals when collected be applied to repay the amount so expended. If bondholders and the Water Company were willing that the hydrant rentals be used for this purpose, and ~~then~~ the aid of the court as a Court of Equity be furnished for their collection in order that the same be used for such purposes, it is hard to see upon what equitable ground the City of Dawson can complain. The city, we take it, will hardly contend that it has the vested right to receive ~~poorer~~ service when through the aid of the court and with the consent of all persons upon whom the burden will fall, better service is furnished than the contract calls for or requires.

At the time the bill was filed, the need for an injunction was immediate and urgent. The city was about to sell its bonds and erect a rival waterworks system, which would practically destroy the value of the security held by these bondholders. A delay until there had been default in the payment of interest and until the Trustee would have had the right to institute foreclosure proceedings by the terms of the mortgage would have been ruinous and would have led to almost the utter annihilation of the bondholders' security. A bill for injunction, if for no other purpose, was an immediate necessity. It is undisputed that long before the final decree was rendered there had been such default as would have authorized the Trustee to foreclose the mortgage, and invoke the aid of the Court to collect and apply to the mortgage debt these hydrant rentals. Such right would have become mature more than four years before the rendition of the final decree. Equity abhors a multiplicity of suits. Its endeavor is to do complete justice in respect to the subject-matter in a single proceeding. It is difficult to see how a city has any right to complain that the decree against it for hydrant rentals is rendered in the present suit, and that two suits were not brought covering the same subject matter and

both necessitating an inquiry into the same facts, and a determination of the same questions of law.

Nor is it any concern of the city's that the Trustee has not through foreclosure proceedings taken possession of the waterworks property, other than the hydrant rentals. The decree in the present case, to which the trustee for bondholders is a party, and by which the bondholders are bound, gives the City of Dawson the right to the carrying out of the present contract superior to any right of the bondholders to take over this property for their debt.

XXVII.

The city in its defense set up that there had been a failure by the Waterworks Company to furnish water for fire protection of a pressure up to the requirements of the contract.

This the city sets up as a reason why it should not be required to carry out the contract at all. The city denies that it has received and used the water. It denies that it ought to pay anything at all. There is no defense of partial failure of consideration. It appears from the evidence that during the entire time the city has used the water at every fire that has occurred in Dawson since the city's repudiation of its contract. It appears that many destructive conflagrations have been prevented by the use of the water. It appears that valuable property has been saved at these different fires amounting to many times the aggregate of the hydrant rentals since the contract first went into effect. At one particular fire the use of the water saved property to the amount of hundreds of thousands of dollars. The city had no other water supply, and up to a few weeks before the filing of the bill, had done nothing looking to the furnishing of a water supply for fire protection, except to obtain authority by vote of the qualified voters to issue and sell bonds, which, however, the city made no attempt to sell until after the rendition of the decision in the Dawson Waterworks case in March, 1899.

It will be seen, we think, by an examination of the defend-

ant's contention that no good reason is shown why this decree for hydrant rentals should not be approved and affirmed as correct.

XXVIII.

An examination of the evidence in the case and of the testimony offered and rejected will show, we think, that there has been at no time any substantial failure on the part of the Water Company to furnish the required pressure.

The long, stubborn fight which has grown out of the City's repudiation and annulment of its contract has naturally stirred up on the part of some of the citizens much rancor and bitterness, and this has led to criticism where no cause for criticism existed, has caused all failures which occurred during the time of greatest demoralization and inefficiency of the fire department; to be charged to the character of the water service furnished; and moreover had led to much exaggeration and coloring of the facts. When the evidence is all sifted, however, when the witnesses' misinformation and hearsay opinions are all separated from their knowledge, when the effects are considered in connection with the existence of facts adequate to cause them, and such as would have caused them whatever might have been the character of the service furnished, the court will have no difficulty in agreeing with the master in his finding that there has been at no time any substantial deficiency of service or failure on the part of the water company to comply with the requirements of its contract. In order, however, that the court may have present before them certain facts which may serve as guides in finding their way through this mass of evidence, we call attention to the following points:

From the time the waterworks were completed up until after the city's repudiation of its contract, viz.: From August 12, 1891, to January, 1895, the water was used at the numerous fires which occurred (and there is no contention that the fires which occurred during that period were less frequent than during any subsequent period of equal length). At none of these

fires was there any complaint of any deficiency or insufficiency or lack of pressure, and there was no dissatisfaction with the character of service furnished at the time the city repudiated its contract, and the repudiation was wholly disconnected with the character of service furnished.

From January 1, 1895, until the summer of 1897, there is no complaint of any insufficiency of pressure or failure of the waterworks company to comply with its contract in every particular, save in 1896, at which fire it appears from the affidavit of B. R. Fussell, the water was only half turned on, a fact only discovered at the end of the fire. At the first trial of the case of Dawson Waterworks Company against the City of Dawson, in the latter part of November, 1896, it appeared from the evidence, which is in the record, that no evidence was offered of any failure or defect of pressure at any fire up to that time. The first fire as to which there is a complaint of lack of pressure was the Green & Whichard fire, which occurred June 11, 1897. General complaints there are in the testimony of some of the witnesses, but nothing definite and specific, and it affirmatively appears from the testimony of witnesses skilled in the work of extinguishing fires and in a position to know, that in fact no complaint of dissatisfaction existed up to the date of that fire, except the one fire in 1896, above referred to. The fires of which complaint were made occurred nearly all of them in the summer, and those as to which the most serious complaints existed were at night, between midnight and day, before the pumps started in the morning, at a season in the year when consumers would leave their hydrants running all night, in violation of the rules of the company, and being at the time when the pressure dropped lowest. The fires were out near the end of one of the smallest mains where the friction loss was greatest. These fires occurred at a time when the city was not adequately supplied with new hose, but on the contrary nearly all the hose was old and defective and of inferior quality. There was no system of rejecting hose. The fire department was in a state of general inefficiency. Long lines of hose were used, such as were sufficient to account for the difference in pressure between that due

to the height of head in the reservoir and the pressure actually furnished through friction loss on well understood principles of hydraulics, even without taking into account the additional loss due to the leaks, roughened lining, and other defects in the hose. There was no intelligent head to direct at these different fires. The hose lines were laid without any due regard to the sizes of the mains, more hose lines being used than was proper with mains of that size. The testimony as to the actual pressure is conflicting, and it will be seen that the witnesses whose testimony apparently is relied upon, is in conflict with those witnesses best in a position to know the truth and least likely to be swayed by partisan passion and prejudice. As soon as the City reorganized its fire department and placed the same in a state of comparative efficiency, it will be seen that the improvement was immediate and marked, and after the city established a paid fire department, there has been at no time any complaint as to the pressure. The city used the water at all fires which occurred. The fires in respect of which there is complaint as to the pressure, are a very small part of those which occurred during the period in question. The water was used with success and many thousands of dollars of valuable property was saved.

XXIX.

The City at no time ever made any complaint to the Waterworks Company as to the character of the service—inadequacy of pressure. No complaint was ever made to the Trustee for the bondholders. It would have been easy to determine the pressure at all times by the use of gauges. When the City established a paid fire department, a gauge was placed in the engine house. The gauge has at all times since the city placed it there shown sufficient pressure. The Trustee for the bondholders never heard that there was ever any dissatisfaction or complaint as to the character of the service, or the amount of pressure until the coming in of the answer to the rule after the filing of the present bill. As soon as this was done the Trustee for the bondholders by amend-

ment asked that the rentals when collected might be allowed to go to the making of such betterments and extensions as the due protection of the rights and interests of the bondholders might require, and that if need be, certificates of indebtedness be authorized for such purpose. The amendment having been allowed, the necessary funds were raised without the issue of certificates of indebtedness, and a new reservoir was erected of more than double the capacity required in the contract, and of a greater height than the first reservoir. Since the erection of this new reservoir there has been no complaint as to pressure. The order granted by His Honor, Judge Pardee, for injunction *pendente lite* contained this provision:

> "Ordered that the defendants may apply to the court at any time after thirty days from the date of this order for a test of the ability of the Dawson Waterworks Company to fully and satisfactorily perform all its obligations and agreements in the regard to the furnishing of water to the city of Dawson for all municipal purposes in the extinguishing of fires included, according to the letter and spirit of its contract; and thereupon the court will order a test and trial of the same by experts under the direction of a Master, and take such action on the Master's report as equity may require."
>
> (Record page 56.)

This order was passed September 16, 1899, and it required, of course, considerably more than thirty days to complete a new reservoir; in fact, the evidence shows that the new reservoir was not completed until the spring or early summer of 1900.

As bearing upon the question of the City's good faith in urging this contention, that the pressure furnished was not sufficient, it is to be borne in mind that the City did not ask that such test and trial be ordered. It is no answer that the Waterworks Company might for a few hours, or a day or two, establish pressure in order to answer the test. If defects of pressure existed by reason of the defective condition of the water tower, or the

fact that the increased consumption of water for domestic purposes had overtaxed the size of the pipes so as to leave them incapable of supplying the required pressure, nothing that the Waterworks Company could do could prevent an expert from discovering such fact.

Moreover, it is well-known that at a trifling expense a self-registering gauge could be put in showing the water pressure at any given part of the system, which it was desired to test, at every time during the twenty-four hours of each and every day throughout as many weeks or months as it was desired to extend such test over, and an expert worthy of the name would have no doubt adopted means to fairly and thoroughly test the efficiency furnished by the system at all times, and at its weakest point or points.

XXX.

The contract itself provides a simple mode of determining the sufficiency of the pressure, viz.: the system

> "Was to produce a pressure on the mains such that from any hydrant located on the principal streets, a stream of water will be projected fifty feet vertically in still air through one hundred feet of fire hose with a one-inch nozzle attached."
>
> (Record p. 289).

The same section provides that in the event there is such failure, the Company shall be allowed a reasonable time to make repairs.

The City never proceeded under this section of the contract.

> "On one occasion the local superintendent of the Water Company tested the pressure from a point on what is known as an "end" pipe. The water failed to reach a height of fifty feet vertically. It was shown that this test was a voluntary act of the local superintendent, without notice

to the officers and owners of the Waterworks Company, or to the City."

(Master's Finding, page 92 of Record.)

It appears that this voluntary test by the local superintendent was during a period of unusual drought in midsummer, and shortly after there had been a fire at which much water had been used. It was on what is known as an "end" pipe, at a point further from the reservoir, and in the quarter of the city where the chief growth of the town had taken place, leading of course to an increase of water consumption for domestic purposes, and a consequent diminution of pressure which the pipe would furnish for fire purposes. The attention of the Waterworks Company was not called to the fact, and no request was made to reinforce that portion of the system; the water at this voluntary test did not fall very much below the required fifty feet. It can not be contended, we think, that this solitary failure of one hydrant out of a total of fifty hydrants, shown to be due to exceptional conditions not existing in the case of the other forty-nine hydrants, and of which the Waterworks Company was not apprised and no request made for the reinforcing of that portion of the system, or for the testing of the other portions of the system, can be regarded as any proof that the system at that time was not meeting the requirements of the contract. Moreover, the test was not made under those safeguards which are necessary to guard against error.

XXXI.

Some testimony was offered on behalf of the city, and rejected by the Master, to the effect that at certain fires specified, the stream of water thrown was of various specified heights less than fifty feet. This is assigned as error by the appellant.

In view of the character of this testimony, such ruling, if erroneous, was immaterial, and the testimony, if admitted, could

not change the Master's, findings or affect the relief to which the complainant is entitled. We think, however, that the court will agree that the view taken by the Master as to the admissibility of this testimony was correct.

The Master offered to admit the testimony if the defendant would state that it proposed to show the existence of conditions substantially similar to those required by the contract in order to produce pressure which the contract requires, or would connect the testimony and show from the height of the stream actually thrown that under the prescribed conditions the stream would have been less than 50 feet, called for by the contract, under the conditions named in the contract.

In view of the fact that the contract furnished an easy and simple test which could have been made at any time, and as often as the city might desire at any and every part of the system, it would seem to be a hardship that notwithstanding the contract provision securing to the water company the right to have the question of the sufficiency of its pressure determined by these definite and simple tests, the city should be permitted to substitute uncertainty and conjecture for certainty. The Master admitted testimony as to the pressure at all those fires where the lines of hose used were not very much greater than those called for in the test prescribed by the contract.

The testimony shows that at these other fires at which it was proposed to show that the pressure was less than the fifty feet, long lines of hose were used, such as would lead to great loss of pressure even if the hose had all been new with smooth and perfect lining and without leaks at the joints ; the hose was old, leaking at the joints, with lining roughened and obstructing the flow, and the loss of pressure was of course very much greater. The witnesses did not even know how many feet of hose were used, but it was shown by the distance of the nearest hydrant to the place where the fire occurred, that the distance, upon the theory that the shortest possible amount of hose was used, would be in every instance considerably in excess of the contract requirements. It was shown, however, not to be the case that the lines of hose were only of

such length as were sufficient to reach the fire. The fire companies would run off a line of hose as long as they happened to have at hand, frequently using a number of surplus lengths, causing loss of pressure, not only on account of increased length, but on account of the fact that the hose would become doubled and twisted with sharp curves and corners instead of the water flowing in a straight line. It was not contemplated that the water pressure furnished was to do the work in extinguishing all fires that occurred without being reinforced by ordinary intelligence and skill on the part of the users. On long lines of hose there should not be ordinarily more than a single line to one of the smaller mains. The city would needlessly use a number of different lines dividing between them, and hence wasting pressure which would have been sufficient for a single line. Moreover, on long lines it is necessary and proper to reinforce the pressure by twin couplings, bringing two streams together and uniting the same into a single stream at a point near the fire, thus by two streams allowing for the loss of one-half of the pressure due to the length of each line.

Moreover, where longer lines of hose are used, it is expected that the fire engine should be employed to reinforce the gravity pressure. The city allowed its fire engine to get out of repair, and ceased to employ an engineer to run it. We contend that it would be exceedingly unjust to the water company under such circumstances to permit unsatisfactory results to be received as evidence that the company on its part was not furnishing the pressure required by a specific test fixed by the contract.

> "Evidence that waterworks tested with hose from 150 to 400 feet long did not throw water seventy-five feet high, is not evidence that the waterworks did not have the capacity to throw a stream that high through a hose 100 feet long, and of a certain size as provided by the contract."
>
> 60 Pac. Rep. 196, Grand Junction Water Co. *v.* Grand Junction. (Court of Appeals of Colorado).

"The original test, in the presence of the city officials, other tests made by the company for its own satisfaction, and results at fires all indicating the capacity of the works to fulfill the requirements, were proven. * * * *

"The evidence introduced by the plaintiff of the ability of its works cast the burden upon the defendant; and in proving the tests upon which it relied, it was incumbent upon it to show that they were within the conditions specified in the contract, beyond which no obligation rested upon the company. * * * * * *

"The length of hose through which the company bound itself to be able to discharge a volume of water 75 feet high was 100 feet; and not only was the length of hose specified, but its size and the size of the nozzle. It did not contract to send streams through more than 100 feet. The force sufficient for that length would, by reason of the additional friction, fail at a greater distance. A test made through 400, or 360, or 150 feet would be absolutely worthless. To prove the want of ability in the works which would amount to a failure of compliance with the contract, not to exceed 100 feet of 2½-inch hose, with a one-inch nozzle, must be used, and evidence not showing affirmatively tests made under contract conditions would be no proof at all."

(Same case, 60 Pacific Rep., p. 200, of opinion.)

XXXII.

The city at all times having received and enjoyed the use of the water, can not decline to pay therefor on the ground of alleged defects, in the absence of any specific pointing out of the alleged defects, and a request that the same be corrected, and a reasonable opportunity afforded within which the same might be corrected after the same was pointed out.

14 S. E. 961, Wilson *vs.* City of Charlotte; s. c. 110 N. C. 449.

It is the duty of the City where the contract requires tests to determine whether the pressure comes up to the requirements of the contract, to make such tests in order that the Water

Company may have the right to remove the defect if any exists.

49 N. W., 272, State *ex rel.* Tarr *vs.* Mayor and Council of Crete; s. c. 32 Neb. 568.

The Court say in that case:

"A city, like an individual, should act in good faith in carrying out its contracts. To construct waterworks like these in this case requires a considerable outlay of money. This in the case at bar seems to have been borrowed, and the lender and equitable owner asks the city to test the works, and if found to conform to the contract, to approve the same, and relieve him from the heavy burden of maintaining the works while the city has the benefit of the same; and in effect if there are slight deficiencies or slight variances from the terms of the contract, that the same may be corrected, and the works if, when corrected, they are found to conform to the terms of the contract, be accepted."

Ib. page 282 of opinion.

It is the duty of a party who is furnished an article under a contract containing certain requirements either to reject the article and refuse to accept it, or if he accepts and uses it, to at once complain of the defects, in order that the party furnishing such article may have an opportunity to remove the defects. We think the principle of natural right and justice contained in this rule is applicable to service of the character furnished in the case at bar. It would seem to be inequitable to permit the city year after year to continue to receive valuable service under a contract containing a specific provision giving the city the right to subject the pressure to a definite test and call upon the water company to make the water comply, and if not, then to forfeit the right of the water company, and deriving great benefits therefrom, and refusing payment after suffering years to elapse without ~~payment~~ complaint on the ground of alleged defects, which if properly complained of, the water-

works company would no doubt have removed, and which if the same ever existed were removed as soon as knowledge came to the water company of any complaint. We belive that this proposition commends itself to a court of equity. We cite in support of it:

62 Federal Reporter, 853, 856, National Waterworks Company *vs.* Kansas City. Court of appeals, Eighth circuit. Opinion by Mr. Justice Brewer, at Circuit.

39 S. W. Rep. 768, Lamar Water & Electric Light Co. *vs.* City of Lamar, Syllabus 3.

It is one of the established principles of the law of sales—a principle founded on the plainest dictates of fairness and justice—that where an article is furnished pursuant to a contract requiring it to be of a certain quality, the buyer must at least object to its quality within a reasonable time after its receipt, or else the law will treat the receipt as a final acceptance and preclude any later objection on the ground of inferior quality.

(Citing Benjamin on Sales, section 703; Graff *vs.* Foster, 67 Missouri, 520; Aurora Water Company *vs.* City of Aurora, 129 Mo. 540; 31 S. W. 946).

"We know of no reason why that rule of law should not be applicable to the water furnished by the defendant to plaintiff. It would be plainly unjust for defendant to receive the water as furnished under the contract for a year or more, and then when called upon for payment, first raise the question of its quality. Water is not an article capable of being conveniently returned, and the reason for requiring a proper objection to such a commodity is even stronger than in the case of the sale of many other articles."

39 S. W. Reporter, page 770 of the opinion; s. c. 140 Missouri Rep. 145.

See also 70 Northwestern Rep. 323, Alpena Water Company *vs.* City of Alpena. (Supreme Court of Michigan).

38 Southwestern Reporter, 89, Neosha Water Company *vs.* City of Neosha, Missouri.

32 Pacific Reporter, 663, City of Winfield *vs.* Winfield Water Company. (Supreme Court of Kansas.)

Even if the city had properly complained and given the water company an opportunity to remedy the defects, yet, the city having continuously used the water, the defense to the suit for recovery of hydrant rentals that the water did not come up to the contract requirements would be defective inasmuch as the city failed to show how much it was damaged by such alleged defects, or how much less valuable, if any, the water was by reason of such alleged defects. The water having been furnished under a contract and having been used under the contract, the city can not successfully defend upon the ground that it is less valuable than contracted for, without showing affirmatively as a necessary part of such defense, the extent to which the city was thereby damaged.

27 Southern Reporter, City of Glenville *vs.* Glenville Waterworks Company. Supreme Court of Alabama.

62 Northwestern Reporter, 613, Sykes *vs.* City of St. Cloud. Supreme Court of Minnesota.

In that case the court say:

"It is claimed by the defendant that there must be a punctilious performance of the contract on the part of the Waterworks Company, or that it can not recover at all, because in the case of defective service, there is no means of measuring the damage which would accrue between full and complete service and deficient or defective service. In the case of Wiley *vs.* Inhabitants of Athol, 150 Mass. 426, 23 Northeastern Rep. 311, heretofore cited, it is held that 'the measure of damages was the difference between the value of the supply of water actually furnished and of that which by the contract should have been furnished, estimated with reference to the uses for which it was furnished.' We are of the opinion that the rule

adopted in this case is correct and applicable to the case at bar, if the defendant should so amend its answer as to conform to the rule of law herein laid down."

XXXIII.

We think, however, another sufficient reply to the city's contention that it should not be required to pay for these hydrant rentals by reason of alleged deficiencies of pressure at certain fires, is found in the fact that if any failures existed, the same are to be charged to the city's own act in withholding from the Water Company its necessary revenues in violation of the contract and accompanied by a repudiation of the obligations of the contract. It appears that there is no contention that there was ever a deficiency of pressure until long after the city had repudiated its contract and withheld from the Water Company the revenues which the city had agreed to raise by taxation and to pay under the contract. At the time of this alleged failure to furnish water of the required pressure the city was indebted to the Water Company for hydrant rentals, in amounts varying from about eight thousand dollars at the beginning to about eleven thousand dollars at the end of the time. Not only were these revenues withheld, but the Water Company was placed where it could not honorably have borrowed money for the purpose of making betterments, extensions or repairs without disclosing conduct on the part of the city which would have destroyed its credit. If the making of necessary repairs had been too long delayed, if the system had not been extended in the direction in which the city grew, leading to a diminution of pressure in that quarter, if the revenues were insufficient to enable the company to operate its pumps at night, as well as by day, and therefore on a few occasions during unusually dry seasons in the summer, the pressure dropped down for a few hours, before the engine that operated the pumps was fired up in the morning, the fault is to be laid at the door of the City of Dawson, which was planning to get the benefit of the fire protec-

tion without paying for the same, and thereby so cripple the Waterworks Company as to prevent it from making the extensive improvements which by the undisputed evidence it was shown it had contemplated, and would have duly made, but for this conduct on the part of the city. It is to be borne in mind, too, that the general inefficiency of the fire department which contributed so largely to this failure is itself the effect of the city's pretense that it was not receiving and using the water and enjoying the fire protection afforded it under the contract, so as thereby to enable it the more effectually to repudiate and annul the contract, and evoke a decision that it was not bound to perform the same.

Least of all should the city be permitted to set up such contention against the bondholders whose property the city during all these years was engaged in a persistent effort to destroy. The city knew at the time that it repudiated the contract that this property, including these hydrant rentals, constituted the security to which these bondholders looked for the money which created this system of waterworks and gave the city and its inhabitants the benefit and use of this water. The city knew that the amount of this debt exceeded the sum which the city was willing to pay for the waterworks, and the valuation which the city placed upon the entire property, yet the city in its efforts to destroy the contract and thereby bring about the destruction of the property which derives its value from the contract, withheld from the bondholders and their trustee all information or knowledge of the city's purpose or the litigation by which it was seeking to carry such purpose into effect. Neither the trustee nor the bondholders had ever heard that there was any trouble, or had any knowledge or information that there was ever at any time any complaint of want of pressure or inefficiency of service. As soon as such complaint came to their notice, notwithstanding the city was still engaged in its effort to destroy the contract and their security, a new and larger reservoir was built at large expense under the agree-

ment that the cost was to be paid out of the hydrant rentals, using up to that extent their security, and giving to the city at all times and at every part of the system a fire pressure in excess of the contract requirements.

XXXIV.

The city's conduct throughout this matter has not been such as to commend it to a court of equity. It entered upon its effort to repudiate the contract and destroy this property for no reason other than that the city desired to own the waterworks, and the Waterworks Company had not in its offer to sell named a price which the city was willing to pay. The service furnished had at all times been satisfactory. It appeared from the evidence that the Waterworks Company made every effort to meet the wishes of the city and its people. No question or suggestion had ever been made that the company had failed to comply with. Before the resolution of June 27, 1894, was adopted, the Waterworks Company had under consideration plans of extensive improvement, and the city was so advised, and only the city's repudiation of its contract led to their being abandoned. The stock ownership in the waterworks is held by a company having contracts with municipalities for public water supply. It has been its invariable policy to meet the wishes of the city and the water consumers as far as possible. The source of supply was selected by the city. The works were constructed in a manner that met the city's full approval. The city undertook the policing and protection of the sources of supply. No request has ever been made of the Water Company for any other measures of protection than those which have been adopted. There is no suggestion that any other available source of supply exists, and it was not until after seven thousand dollars had been expended in the erection of a new reservoir in order to meet the only complaint that the city had made up to that time (and that as soon as the complaint came to the knowledge of the water company) that the city by its later answer set up its

dissatisfaction with the sources of supply which it originally selected, which the city assumed to police, and was under the duty of policing and protecting, and which does not appear to be substantially different from what it was at the time of its selection. The city's complaint that a butcher pen exists within the water shed was first heard of when the testimony was taken before the master on behalf of the defendant. Not only had there been no request to the Water Company to take action, but the city, it had been supposed, would deal with, under the police power, any duties placed upon the city by the Act of the Legislature. After the testimony was closed, and the report of the master rendered, the city asked to open up the testimony to admit evidence that birds had been allowed to roost on the reservoir, and one of them had fallen in and been drowned. The Waterworks Company, as soon as it was learned that the fact that the water tower was the tallest object in that locality, made it a sort of watch tower on which birds congregated, placed a contract for a covering for the reservoir, and the same was completed and put in place as early as it was possible to secure the material. The city knew that the steel sheeting had been ordered, and that the delay was due to the mills being overcrowded with orders, and that the Water Company had at last succeeded in getting the material, and had its contractor on the ground engaged in the construction of this roof when this application to open up the case and take fresh testimony was made. This matter is mentioned in order to show the city's attitude throughout this litigation.

It is only by furnishing to the inhabitants of the city good service that the Water Company or the bondholders who are the equitable owners of the property, can hope to make their property a paying investment. They only await a final decision of this burdensome and unfortunate litigation to give to these good people the most efficient and satisfactory service that the conditions render possible.

We believe the majority of the good people of Dawson deplore

the course upon which the city has embarked, and a final and just decision of this controversy will, we believe, be most fortunate to all interests alike.

Respectfully submitted.

JOHN I. HALL,
OLIN J. WIMBERLY,
Counsel for The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 164.

THE CITY OF DAWSON, APPELLANT,

vs.

THE COLUMBIA AVENUE SAVINGS FUND, SAFE DEPOSIT, TITLE AND TRUST COMPANY.

SUPPLEMENTAL BRIEF OF JOHN I. HALL AND OLIN J. WHEELER, COUNSEL FOR THE COLUMBIA AVENUE SAVINGS FUND, SAFE DEPOSIT, TITLE AND TRUST COMPANY, APPELLEE.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1905

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 154.

THE CITY OF DAWSON, APPELLANT,

vs.

THE COLUMBIA AVENUE SAVINGS FUND, SAFE DEPOSIT, TITLE AND TRUST COMPANY.

Supplemental Brief of John I. Hall and Olin J. Wimberly, Counsel for the Columbia Avenue Savings Fund, Safe Deposit, Title and Trust Company, Appellee.

Exclusive Franchise, and the Question of the City's Right to Revoke.

I.

It will not be questioned, as we take it, that the city of Dawson had authority to provide water supply for fire protection and for the domestic use of its inhabitants. As shown in the principal brief, the Georgia courts have uniformly held from the beginning until the present time that a city or town in Georgia has such power under what is commonly called the "General welfare clause." The court

recognizes that this power is broad and unrestricted, except so far as this has been qualified by the construction recently placed by our supreme court upon the meaning of the term "debt," as used in the Georgia constitution.

The court recognizes that this right extends both to entering into a contract with a water company or individual and municipal ownership of water works. This is recognized in each of the three Dawson Water Works cases referred to in the brief, namely:

Dawson Water Works Co. *vs.* Carver, 95 Ga., 565;
Mayor & Council of Dawson *vs.* Dawson Water Works Co., 102 Ga., 594;
City Council of Dawson *vs.* Dawson Water Works Co., 106 Ga., 696,

as well as in the

Cartersville Cases, 89 Ga., 683, 689, and
Lott *vs.* Waycross, 84 Ga., 681,

and the earlier cases cited on the brief and in the report of the master.

This "General welfare clause," which thus vests the city of Dawson with this power, is in the broadest and most general terms, the language being as follows:

"SECTION 6. *Be it further enacted*, That the said mayor and aldermen shall have power and authority from time to time, to make, ordain, and establish such by-laws, ordinances, rules and regulations, as shall to them appear necessary and proper for the security, welfare, convenience, and interests of the said city of Dawson, and the inhabitants thereof, and for preserving the health, morals, peace, order, and good government of the same and not inconsistent with the constitution and laws of Georgia" (Record, p. 222).

In this connection is to be considered the act of the General Assembly of the State of Georgia of November 12, 1889, codified as sections 2407, 2408, and 2409 of the Code of Georgia (edition of 1895), conferring on corporations or per-

sons "constructing, owning, operating, or carrying on water works in this State" the right of eminent domain by which they may acquire all land or easements of land "necessary or proper for the construction and successful operation of water works" by condemnation proceedings, instituted and conducted in the manner provided by the Code, and other rights and privileges. This act confers the privileges therein mentioned upon water works companies or individuals supplying water for public purposes to municipal corporations, the language used being:

"None of the provisions of the two preceding sections shall become operative until after the said corporation, company, or individual shall have *bona fide* entered into a contract with the proper authorities of some incorporated city or village of this State for supplying water for public purposes."
Code of Georgia, section 2409.

Thus the general law recognizes the right of cities and villages to make contracts for supplying water for public purposes with water companies or persons owning and operating water works in this State without any express restriction or limitation.

No restriction or limitation is to be found in any of the statute law of the State. There is nothing, therefore, in the law or public policy to make this power less broad or general than the general and broad language used in the charter would indicate. We believe that it will be recognized as a sound and well-settled rule of interpretation, without the necessity of citing authorities, that the more general the terms creating a power, the broader and more unlimited is the power. It is the office of particular provisions and specifications to restrict; general terms grant without restriction or limitation. This is a rule of logic, and, as we understand it, a universal rule of statutory interpretation.

The city, therefore, being vested with the power of entering into a contract with a water company for water supply for

public purposes, and there being no limitations or restrictions placed by the law upon the exercise of this power, it would seem that the city is not limited as to what terms and provisions it may embody in the contract, provided only the contract be not unreasonable.

This rule of interpretation, we think, is particularly true with respect to business or proprietary powers of the municipality, as distinguished from those powers which are more properly classed as governmental or sovereign.

The distinction between these two different classes of powers is well recognized, though, of course, even in the cases of business or proprietary powers, the city is still a governmental agency, clothed with powers appropriately belonging to the sovereign, and delegated to the city by the sovereign for the public good.

It would seem to be a rule, whose soundness cannot be questioned, that, in determining the extent of the business powers of a municipality, sound interpretation requires that the court should take into account existing business conditions. Under business conditions which exist and are well recognized, a company cannot afford to embark upon a large undertaking of establishing a system of water works, except with the expectation that for a reasonable limit of time the company should be protected from a dividing out of a field not big enough for two, and particularly from competition on the part of the municipality itself, which could only have one possible effect, namely, the destruction of the company's investment and the practical extinguishment of the rights of the water company. That a water company, as a practical business proposition, requires something more than a contract from year to year, and something more than a divided field, in order to exist and earn a revenue upon its investment, is a recognized fact, and no rule of interpretation can be sound which leaves this existing condition out of account.

For the court to hold that a city can make a contract for

water supply, for fire protection, and for the domestic use of its inhabitants, and yet at the same time hold that such contract can only be made under conditions and limitations which would render it impossible for the city ever to find persons willing to enter into such contract, is to hold that the city has a power which is theoretical rather than actual and practical. No city the size of Dawson can afford to have two rival systems of water works, with duplicate mains, duplicate pumps, duplicate reservoirs, and duplicate operating expenses. This is not only true of Dawson, but of the vast majority of the towns throughout our land having need of water works for fire protection and for the domestic use of its inhabitants.

If, therefore, the city has the right to provide for water supply, and such right means anything, it is the right to contract with a company for an exclusive supply.

As well stated by the supreme court of Iowa in a case recently decided by that court, "It requires no argument or citation of authorities to sustain the proposition that if the city had the power to make the contract for its supply of water it would not be void because of exclusiveness, for contracts for service of this kind must, in their very nature, be exclusive."

98 N. W. Rep., 892, Davenport Gas, etc., Co. *vs.* Davenport, page 896 of opinion.

II.

There is nothing in the Georgia constitution forbidding the creation of "perpetuities or monopolies," as there is in the constitution of several of the States. At common law an exclusive privilege to supply water or gas is not a monopoly.

"There are cases of exclusive privileges which are held not to be monopolies within the meaning of the common law, as the exclusive right to erect a bridge and take tolls. Thus it appears that the exclusive privilege to supply water

or gas are not considered monopolies according to the common law, because they do not deprive a class of persons of privileges of which they had anterior to the grant been in possession."

McQuillin on Municipal Ordinances, sec. 191, p. 306.

While not a monopoly as the term was understood at common law, yet it is conceivable that the use of the word monopoly in the State constitution might be regarded as such a general indication of State policy as would lead the courts of that State to adopt a more stringent rule with respect to contracts of this character, and we believe that it will appear on examination that in every State where the courts have denied a city's right to grant exclusive franchises to water and gas companies there exists a constitutional provision in terms forbidding the grant of a monopoly. Such at least is the case as far as our investigation has gone.

III.

It is, however, insisted on behalf of appellant that a contract for exclusive water supply is forbidden by article 1, section 3, paragraph 2, of the constitution of the State (Civil Code, sec. 5730). We think this insistence is founded upon a misapprehension of the true purpose and meaning of that provision of the constitution. The language of the provision is as follows:

"No bill of attainder, *ex post facto* law, retroactive law or law impairing the obligation of contracts, or making irrevocable grants of special privileges or immunities shall be passed."

Const. of Georgia, art. 1, sec. 3, par. 2, Code, sec. 5730.

In order to have the full provision before the court, paragraph 3 of the same section of the constitution, and which

immediately follows it, is to be read in connection with the foregoing, the same being as follows:

"No grant of special privileges or immunities shall be revoked, except in such manner as to work no injustice to the corporators or creditors of the incorporation."

Constitution of Georgia, article 1, sec. 3, par. 3 (Civil Code, sec. 5731).

These two paragraphs of the same section of the constitution cover the same subject-matter, employ the same form of expression, and evidently the latter is intended to restrict, limit, and qualify the former. The "irrevocable grants of special privileges or immunities" in the paragraph which precedes of course relates to the same thing as the revoking of "grants of special privileges or immunities" in the paragraph immediately following. Section 3 therefore in its entirety is as follows:

"No bill of attainder, *ex post facto* law, retroactive law or law impairing the obligation of contracts, or making irrevocable grants of special privileges or immunities shall be passed.

"No grant of special privileges or immunities shall be revoked, except in such manner as to work no injustice to the corporators or creditors of the incorporation."

While, therefore, the grant referred to in this section of the Constitution is not absolutely and unconditionally irrevocable, yet there is affixed a certain condition to such revocation, namely, that it shall be in such manner as to work no injustice to "the corporators or creditors of the incorporation."

It appears, therefore, that the grant of special privileges or immunities which the Constitution has in mind is of special privileges or immunities to a *corporation*, for nothing else except a corporation has "corporators" or "creditors of the incorporation."

The use of these words "corporators" and "incorpora-

tion" in this section of the Constitution seems to leave no room for doubt as to the character of the law making "irrevocable grants of special privileges or immunities" which the framers of the Constitution had in mind, even if we did not have regard to the history of the origin of statutory and constitutional reservations of this character.

Their history is nowhere more clearly set forth than in the opinion of Mr. Justice Miller in—

Greenwood *vs.* Freight Co., 105 U. S., 13,

and in the opinion of the same learned judge in—

New Jersey *vs.* Yard, 95 U. S., 104.

This court again reviews the subjects in—

Citizens' Savings Bank of Owensboro *vs.* Owensboro, 173 U. S., 637.

As will be seen by comparison with similar provisions in the constitutions and statutes of other States, and the public history which led up to their adoption, the above quoted section of the Georgia constitution is merely a reservation of the right to amend corporate charters so as to take the same out of the operation of the decision in Trustees of Dartmouth College *vs.* Woodward, 4 Wheat., 518.

As lucidly set forth by Mr. Justice Miller in Greenwood *vs.* Freight Company (above cited), the effect of the decision in the Dartmouth College case was to extend the protection of the contract clause of the Federal Constitution "somewhat in advance of what had been decided in Fletcher *v.* Peck (6 Cr., 87), and the preceding cases."

"It became obvious at once that many acts of incorporation which had been passed as laws of a public character partaking in no general sense of a bargain between the States and the corporations which they created, but which conferred private rights, were no longer subject to amendment, alteration or repeal, except by consent of the corporate body, and that the general control which the legislators

creating such bodies had previously supposed they had the right to exercise no longer existed."

Page 20 of opinion, 105 U. S., Greenwood *vs.* Freight Company, *supra.*

In the Dartmouth College case, Mr. Justice Story, in his concurring opinion, suggested that a provision in the statute reserving to the legislature the right to amend or repeal it must be held to be a part of the contract itself, and hence such amendment or repeal of the charter thereafter could not constitute an impairment of the obligation of the contract.

A general statute or constitutional provision to the same effect would likewise be read into the subsequent statute passed subject to it, and would therefore be held to be a part of the contract.

As the opinion recites, "It would seem that the States were not slow to avail themselves of this suggestion."

Such being the obvious and well-known purpose of these provisions, it would be doing violence to the intention of their framers to extend the provisions to the case of ordinary contracts between the State, or a municipal corporation of the State in the exercise of its proprietary or business powers, and a person or corporation from whom the State or municipality purchased some article of necessity undertaking to pay therefor in money, and partly in things valuable to the other contracting party, or containing those safeguards without which the other party would not have been willing to embark upon the undertaking.

It is to be borne in mind that, as pointed out in the opinion above referred to, acts of incorporation, while possessing in a certain sense attributes of a contract, yet in another sense, and perhaps more largely, possess all the attributes of general legislation.

As pointed out by Mr. Justice Miller, it is frequently very difficult or perhaps impossible to draw the line which is to determine where legislation ends and contract begins. The

States therefore naturally sought to place laws of this char acter back where the same were supposed to stand before the decision in the Dartmouth College case.

The grants of "special privileges or immunities" referred to in the Georgia constitution are therefore grants contained in acts of incorporation, "laws" in the common acceptation of the term, as distinguished from contracts in the common acceptation of the term; "laws" relating to "incorporation," as distinguished from grants by contract which have no necessary connection with acts of incorporation, and therefore need no exception in favor of "the corporators or creditors of the corporation."

It is doubtless true that the State, acting in its ordinary business or proprietary capacity in the making of a contract, or bargain, in the popular acceptation of the term, may be said to pass a law. Every act of the legislature, whether administrative, or legislative in the narrower acceptation of the term, is a law. It cannot appropriate money except by law. It cannot contract for supplies for the State except by law. And the same may be said of cities and towns.

A State, for instance, making a contract for the construction of a State house, legislates, and the contractor who obtains the contract obtains a "special privilege" not enjoyed by others. The law awarding him the contract at the price therein fixed may, therefore, in a sense, be said to be the grant of a "special privilege." But it would hardly be argued that it was the grant of a special privilege within the meaning of article 1, section 3, paragraph 2, of the Georgia constitution; and it would hardly be contended that without cause, and while the contractor was carrying out his contract, and after he had incurred large expense in getting ready to carry out the contract, and in preparing materials which would be largely lost to him unless he could use the same in carrying out the contract, the State could repudiate the contract and leave upon his hands the stone and other materials suitable only for carrying out that particular con-

tract and causing the loss of the large investment that he had made for the purpose of carrying out the contract, and that this would be nothing more than the revoking of a special privilege which the constitution of Georgia, made with notice, the State would have the right to revoke, and that he therefore would have no right to complain.

In the same way it would seem that when a city contracts for water supply and sees fit to contract, not for a portion only of its water supply, but for the entire water supply for the reasonable time limited in the contract, or, in other words, makes the contract exclusive for that time, by reason of the business necessity that such contract should be exclusive, the contract does not fall within the operation of paragraph 2, section 3, article 1, of the constitution of the State.

IV.

It is doubtless true that a State entering into what may be denominated a private contract or a bargain between the State and an individual in the common acceptation of the term contract frequently embodies in the contracts features which would not be possible except for the fact that the State possesses attributes of sovereignty. Thus the State may by law authorize the issue of State bonds, and in the bonds provide that the coupons shall be received in payment of taxes—and there is no more sovereign power than that of taxation—and a provision of that character might in all likelihood add very largely to the attractiveness of the bonds. The possessor of such bonds would acquire a special privilege of a high order by reason of holding such a contract; yet it would hardly be contended that such a contract was revocable. So, in the same way, a city's right to provide water supply for fire protection and for the use and for the protection of the health of the inhabitants may, as an incident to the main undertaking, embrace

features which the city would not possess but for the fact that there has been delegated to it by the State the entire matter of providing water supply, with all its necessary incidents, and with all those things which under existing business conditions are essential to a contract of that character, for the reason that without them the other party could not afford to make the large outlay necessary for the purpose.

A contract by a municipality for water supply, while in a sense a law, and while in a sense a law granting a special privilege, in that the city does not grant to other persons during the same time the right of supplying it with water, yet, in its essence, is rather to be classified as a business contract for the supply of a necessary, for a consideration and with mutual safeguards and features of mutual benefit. It is not, therefore, the case of a law of a public character "partaking in no general sense of a bargain" between the city and the other party, according to the classification laid down by Mr. Justice Miller.

To hold that a contract of bargain and sale between an individual and a city acting in its business or proprietary capacity (though possessing also governmental powers) is revocable would, therefore, be to overturn the entire doctrine under which municipal corporations, equally with private individuals, are held liable upon their undertakings. The water company is bound to furnish all the water that the city and its inhabitants require. By mandatory injunction, as has been several times held, the water company can be restrained from refusing to furnish water to a single inhabitant. If it fails to furnish sufficient water for the use of all of the inhabitants and for all the other purposes mentioned in the contract, keeping pace with the growth of the city and its increased consumption, such violation is by the contract made a sufficient cause for revoking the charter.

If the city can require the water company to furnish water for all these purposes, and for every inhabitant, (and this no

one will contest,) then it is difficult to see upon what idea, consistent with the well-recognized rules that contract obligations are mutual, it can be denied that the city may contract that the water company so bound to furnish all the water required, shall have the right to furnish all the water required during the time that it is so bound by the contract.

V.

It will be seen that the opinion of the court delivered by Mr. Justice Miller in the two cases above referred to (Greenwood *vs.* Freight Co. and New Jersey *vs.* Yard) draws a very clear distinction between a contract within the narrower acceptation of the term, as a bargain between contracting parties, whereby one is to furnish services, or wares, which the other is to pay for in money or equivalent benefits, or *money and other benefits*, with covenants for mutual protection, and "acts of incorporation which had been passed as laws of a public character, partaking in no general sense of a bargain between the States and the corporations which they created, but which yet conferred private rights," and which, when accepted by the corporators, "were no longer subject to amendment, alteration or repeal, except by consent of the corporate body," by which it was brought to pass "that the general control which the legislatures creating such bodies had previously supposed they had the right to exercise, no longer existed."

It is distinctly recognized that only acts of incorporation, or amendatory acts of incorporation, "passed as laws of a public character, partaking in no general sense of a bargain between the States and the corporations which they created," fall within the meaning and operation of these statutory and constitutional provisions, intended to reserve to the legislature legislative control over laws of this character, and that such reservations do not apply to those rights of the corporation founded on contracts which do partake of

the nature of a bargain within the narrower and, until the Dartmouth College case, the ordinary and more usual acceptation of the term contract.

In New Jersey *vs.* Yard (95 U. S., 104, *supra*), the court apply to a certain amendatory statute tests to determine whether it was the intention of the legislature to confer additional corporate charter privileges or immunities within the statutory reservation of the State's right to amend or revoke, or a contract proper, such as passed beyond the State's power to deal with and affect by future legislation. In that case, although there was no bargain in the sense that the State directly purchased services or necessaries, like a statehouse, public building, lights, water, etc., for which the State promised to pay, as would a private person contracting for services or necessaries of a similar character, yet the court held that the supplemental act of the legislature, granting tax exemption, was to be properly treated and regarded as a contract, intended as such by the legislature, and not a corporate charter amendment within the general statute reserving to the State the right to alter or revoke grants of corporate rights and franchises.

The court in reaching this conclusion lay stress upon the fact that the other party was required to formally accept the provisions of the supplemental act. And the court say: "Can it be believed that it was intended by either party to this contract, that, after it was signed by both parties, one was bound forever, and the other only for a day?"

Whether the court would again go to the length of holding that a tax exemption granted by a public statute, which contained so little of the character of a bargain in the general sense was contractual and not within these reservations, may be regarded as doubtful in view of the majority opinion in the later case of Citizens' Savings Bank of Owensboro *vs.* Owensboro, 173 U. S., 637. The distinction between contracts of a State or municipality, in the more limited sense of the term contract, and "acts of incorpora-

tion which had been passed as laws of a public character, partaking in no general sense of a bargain between the States and the corporations which they created," has, however, never been lost sight of in any of the later decisions.

The fact that it is laws of the latter character and not contracts of the former which the State has undertaken to reserve its right of control over by subsequent legislation, we think, is clear, whether we have regard to the origin of these reservations, as found in well-known public history, or the internal evidence afforded by the language of the various reservations themselves.

No reason appears, or at least is to be found in these reservations, why the State, when it entered the field as a purchaser of any commodity necessary to be provided by it, should not possess that freedom of contract which is not only just to the other contracting party, but which will be found to be useful to the State in order that it may be enabled to purchase the commodity on the most advantageous terms.

The right to furnish water to the city does not arise out of the charter of the water company. It is not a franchise or privilege that the charter creates or bestows. It is in no sense a corporate privilege or immunity. It is created by contract with the city. By means of the contract the city is merely carrying into effect for the public good a power which the State has seen fit to permit the city to exercise.

In fact, it is not necessary that persons entering into a contract of this character with a city should form a corporation at all. The act of November 12, 1889 (Civil Code of Georgia, §§ 2407, 2408, 2409), expressly recognizes the right of individuals, companies, or corporations to construct, own, operate, or carry on water works, and to enter into contracts with incorporated towns and villages for supplying water for public purposes.

If this last act create a franchise, therefore, it is not a corporate franchise; and if a corporate franchise, only the State,

by a repeal of the law, could revoke it, certainly the city could not.

The exclusive feature of the contract grows out of and inheres in the character of the subject-matter of the contract, the nature of the thing to be furnished and the service to be performed; the practical conditions which surround and circumstance the exercise of the power.

It is by nature, and under unavoidable conditions, an integral, indivisible something, and not a something to be parceled out amongst the citizens generally. For practical purposes, as a business proposition and as conditions exist in our villages, towns, and smaller cities, two water works companies or competing systems cannot occupy the same space at the same time. The privilege of furnishing water to the town is not for the benefit of the individual or the water works corporation, but for the benefit of the inhabitants of the town in their collective capacity. The right of all to furnish cannot exist consistently with the right of all to be furnished. The latter being paramount, the former must yield.

VI.

The above views, we think, are in harmony with and sustained by the authorities.

Thus the constitution of the State of Iowa provides:

"*Amendment of Repeal of Charters; Exclusive Privileges.*

"SECTION 12. Subject to the provisions of this article, the General Assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two-thirds of each branch of the General Assembly; and no exclusive privileges, except as in this article provided, shall ever be granted."

Constitution of the State of Iowa, art. 8, sec. 12; Ann. Iowa Code of 1897, page 101.

The constitution containing this constitutional provision was adopted March 5, 1857.

In Grant *vs.* City of Davenport (36 Iowa, 396), decided by the supreme court of that State at the June term, 1873, it was objected to a water-works contract containing the grant of the exclusive privilege of supplying the city and its inhabitants with water for a term of years, that such exclusive feature was violative of the constitution. The court sustained the contract, and the court say:

"It is further objected that the ordinance grants to the water company privileges and immunities which on the same terms cannot be enjoyed by all citizens. The ordinance and its acceptance by the water company constitute a contract. It can hardly be good law to hold this contract invalid because the city cannot make the same contract with every other citizen or company. Such a multiplicity of contracts might give the city too much water."

Ibid., 36 Iowa, 396, page 406 of opinion.

In a case recently decided by the same court the same doctrine is adhered to.

98 N. W. Rep., 892, Davenport Gas and Electric Company *vs.* City of Davenport.

In that case the court held:

"A city having the power to contract for lights for a certain period, its contract is not void because of the exclusiveness which arises from the very nature of such a contract."

Ibid., 98 N. W., 892, syllabus 6.

The court cites a number of authorities and discusses the validity of the grant of exclusive rights in contracts for the supply of water and gas. The court sums up its conclusion in the language following:

"It requires no argument or citation of authorities to sustain the proposition that if the city had the power to make the contract for its supply of water, it would not be void be-

cause of exclusiveness, for contracts for service of this kind must, in their very nature, be exclusive."

For a discussion of this subject—

See Bartholomew *vs.* City of Austin, Texas, 85 Fed. Rep., 359; 29 Circuit Court of Appeals, 568; 52 U. S. Apps., 512,

decided by the circuit court of appeals for the fifth circuit.

It will be seen that the case last cited involved the question of the validity of such a contract under the laws of the State of Texas, in which State there is a constitutional provision forbidding "perpetuities and monopolies." Under such a constitutional provision it might very well be held that there is indicated a State line of policy which extends the term monopoly beyond the meaning of the term monopoly as used at common law, or, as it might be otherwise expressed, beyond the range of monopolies forbidden by common law.

In Georgia, however, there is no constitutional provision dealing with the subject of monopoly or indicating any line of State policy forbidding the granting of exclusive rights and privileges.

In the section of the Georgia constitution above quoted, and which is relied upon by apellant, the word "exclusive" does not occur. Even if it be argued that the words "special privileges or immunities" are broad enough to include the grant of an exclusive right by contract of a thing which in its very nature is necessarily exclusive, yet it will be seen that the constitution does not forbid the grant of special privileges or immunities, but only provides that any law which the legislature may pass containing such grant shall not be irrevocable, but the same shall be subject to revocation; upon condition, however, that they shall only "be revoked in such manner as to work no injustice to the corporators or creditors of the incorporation."

In the constitution of the State of Mississippi it is provided:

"Corporations shall be formed under general laws only. The legislature shall have power to alter, amend or repeal any charter of incorporation now existing and revocable, and any that may be hereafter created, whenever, in its opinion, it may be for the public interest to do so; *provided, however*, that no injustice shall be done to the stockholders. * * *"

Const. of Miss., art. 7, sec. 178.
Thompson, Dillard & Campbell's Ann. Code of Miss. (1892), page 70.

In Vicksburg Water Works Company *vs.* Vicksburg, 185 U. S., 65, this court had before them a bill for injunction brought by the Vicksburg Water Works Company, which claimed an exclusive franchise to supply water to the city of Vicksburg, in which it was sought to restrain the municipality from constructing water works, under an act of the legislature of Mississippi passed subsequent to the making of the contract authorizing the city to issue bonds to purchase or construct, equip, and maintain a water-works system. Jurisdiction was predicated of the attempted impairment of contract, there being no diversity of citizenship. The exclusive feature of the contract relied upon by complainant was contained in section 1 of the ordinance constituting the contract, and which was in the following words:

"SECTION 1. That in consideration of the public benefit to be derived therefrom, the exclusive right and privilege is hereby granted for the period of thirty years from the time that this ordinance takes effect, unto Samuel R. Bullock & Company, their associates, successors and assigns, of erecting, maintaining and operating a system of water works in accordance with the terms and provisions of this ordinance, and of using the streets, alleys, public squares and all other public places within the corporate limits of the city of Vicksburg, Mississippi, as they now exist or may hereafter be extended, and within such other territory as may now or hereafter be extended, and within such other

territory as may now or hereafter be under its jurisdiction for the purpose of laying pipes, mains and other conduits, and erecting hydrants and other apparatus for conducting and furnishing an adequate supply of good wholesome water to the city of Vicksburg, Mississippi, and its inhabitants, for public and private use, and for making repairs and extensions to the said system from time to time during the period in which the ordinance shall be in force."

(The remainder of the contract in its general features is similar to the contract at bar.)

The bill was demurred to on the ground that the court was without jurisdiction, for the reason that it did not appear that a valid contract existed which it was sought to impair, and that there was therefore not presented a controversy which involves a Federal question under the laws or Constitution of the United States. The lower court sustained the demurrer and ordered the bill dismissed, but allowed an appeal to this court on the jurisdictional question presented. The court reversed and remanded the cause, holding that the cause presented a controversy so arising under the laws and Constitution of the United States as to give the circuit court jurisdiction. It is true the court does not expressly rule that the exclusive feature of the contract is valid, but we think that the reasoning adopted by the court indicates that this provision in the contract was, in their opinion, valid. The case at least sustains the jurisdiction of the circuit court in the case at bar upon this feature of the case, irrespective of the other equities contained in the present complainant's bill. The ruling of the court will, we think, sufficiently appear from the syllabus, which is as follows:

"By the act of March 18, 1886, the city of Vicksburg was authorized to provide for the erection and maintenance of a system of water works, and the contract made in accordance with its provisions was within the power of the city to make, and the subsequent legislation, State and municipal, set forth in the bill, impairs the contract rights of the water company, within the protection of the Constitution of the

United States, unless the city can point to some inherent want of legal validity in the contract.

"It is one of the most valuable features of equity jurisdiction, to anticipate and prevent a threatened injury, where damages would be insufficient or irreparable; and the exercise of such is for the benefit of both parties, in disclosing to the defendant that he is proceeding without warrant of law, and in protecting the complainant from injuries which, if inflicted, would be wholly destructive of his rights.

"This cause presents a controversy so arising under the laws and Constitution of the United States as to give the circuit court jurisdiction."

185 U. S., 65, Vicksburg Water Company *vs.* Vicksburg.

Counsel for appellant in the court below and in this court have sought to distinguish the Walla Walla case (172 U. S., 1) from the case at bar upon the ground that the constitution of the State of Georgia forbids the grant of any exclusive right or privilege, or undertaking on the part of the city that it will not enter into competition with the water company in the furnishing of water during the life of the contract such as was granted by the contract in that case; relying upon the sections of the Georgia constitution above quoted as sustaining its contention. A comparison of the constitution of Washington which was in force at the time the Walla Walla case arose with the section of the Georgia constitution above quoted will show that the provisions contained in the constitutions of the two States are strikingly similar, and that the language contained in the constitution of Washington is in fact broader than the language contained in the Georgia constitution.

Under the constitution of the State of Washington, article 1, section 8, it is provided:

"No law granting irrevocably any privilege, franchise or immunity shall be passed by the legislature."

Ballinger's Ann. Code and Stats. of Washington, vol. 2, p. 2068; Constitution, sec. 8, art. 1.

It will be seen that this section does not refer in terms to a corporation or corporators, as does section 3 of article 1 of the Georgia constitution, above quoted, and therefore this language is to be referred to a reservation of the State's powers over corporate charters by inference from public history, unaided by any express language used, as in the case of the Georgia constitution.

Moreover, there is no provision in the Washington constitution that the revocation shall be in such manner as not to work injustice. Moreover, the words "any privilege, franchise, or immunity" are broader than the words in the Georgia constitution, namely, "special privileges or immunities."

Again, it is elsewhere provided in the constitution of the State of Washington:

"No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations."

Const. State of Washington, art. 1, sec. 12.
Ballinger's Ann. Codes and Stats., vol. 2, p. 2069.

No such provision as this is contained in the Georgia constitution.

Again, it is provided in the constitution of the State of Washington:

"The legislature is prohibited from passing any private or special laws in the following cases:

* * * * * * *

"6. For granting corporate powers or privileges.

* * * * * * *

"8. For incorporating any town or village, or to amend the charter thereof."

Const. State of Washington, art. 2, sec. 28.
Ballinger's Ann. Code, vol. 2, pp. 2088, 2081.

No similar provision is contained in the Georgia constitution.

Again, it is provided in the constitution of the State of Washington:

"Monopolies and trusts shall never be allowed in this State," etc.

Art. 12, sec. 22, Const. of the State of Washington; Ballinger's Ann. Code, vol. 2, p. 2117.

There is no provision in the Georgia constitution forbidding monopolies and trusts.

Again, it is provided in the constitution of the State of Washington:

"Corporations may be formed under general laws, but shall not be created by special acts. All laws relating to corporations may be altered, amended or repealed by the legislature at any time, and all corporations doing business in this State may, as to such business, be regulated, limited, or restrained by law."

Const. State of Washington, art. 12, sec. 8.
Ballinger's Ann. Code, vol. 2, p. 2113.

These constitutional provisions were all of them of force at the time the contract between the Walla Walla Water Company and the city of Walla Walla went into operation. The city of Walla Walla was incorporated by an act of the Territory of Washington, but we take it that we need cite no authority for the proposition that municipal charters are subject to modification by a change in the law or fundamental policy of the State at any time, the rule in the Dartmouth College case not extending to the charters of municipal corporations.

We shall later in the brief discuss the Walla Walla case more in detail; and we merely refer to it at this point in order to call attention to the fact that the decision in that case cannot be held inapplicable to the case at bar upon the ground that there is any difference in the constitutions of the two States.

Appellant relies upon the case of Bienville Water Sup-

ply Company *vs.* Mobile, 186 U. S., 212, as holding that a contract of this character may be revoked by subsequent act of the legislature. It will be seen, however, from an examination of that case, that the court holds no such thing; but that the court is dealing with a corporate franchise contained in the water company's charter, and not with the terms and covenants of a contract between a city and the water company. On the contrary, it appears that the water company's contract with the city would expire before the city expected to supply itself with water. It was never contended by the city that it had any right to enter into competition with the water company for the supply of water for fire protection or for the use of the inhabitants until after its contract should expire. The Bienville Water Supply Company claimed that after the expiration of its contract with the city on July 1, 1900, it still had the right to an exclusive franchise under certain acts of the legislature.

The Supreme Court said:

"The plaintiff took its charter with notice that it was not given the exclusive right to supply the city of Mobile with water, and it had not at the time of the transaction referred to in the pleadings, *obtained that which its charter, before amended, authorized it to obtain, to-wit: the exclusive right to all sources of supply in the county.*"

186 U. S., 212.

The facts of the case were these: In 1840 the city of Mobile, which at the time owned a water-works plant and source of supply on what was known as Three-mile creek, entered into a contract with Stein, in which he received the exclusive right to supply the city with water from said stream, the city being given the right to purchase his plant at a price to be fixed by arbitration. This contract was ratified by the act of the legislature. Stein constructed his plant, and it was for many years the sole source of supply. This source not proving satisfactory, a charter was after-

wards granted to the Bienville Water Supply Co. by two statutes, dated February 19, 1883, and February 14, 1885.

By these statutes the company was given the right to purchase the Stein franchise, which, by the contract with Stein, was granted the city, and for that purpose was to be considered the assignee of the city; also the right to acquire by contract with the owners any other franchise and plant for supplying Mobile with water, including the right to condemn necessary supply under the State's right of eminent domain. These statutes gave the water company for twenty years, and until the purchase of the plant by the city, the exclusive right to supply the city with water from any source other than the Three-mile creek already granted to Stein, and, in the event it should acquire the Stein franchise, the exclusive right from that creek also. The statute, however, qualified this exclusive grant by making the same subject to this proviso: "But nothing in this act shall be considered to prohibit the organization hereafter of any other company for the purpose of supplying the city of Mobile or any other place with water which does not interfere with the property rights, or rights obtained herein to this company."

The owners of the Stein franchise endeavored, by litigation, to prevent the erection of appellee's plant, but in the case therein referred to (141 U. S. 67,) Stein was held to have no exclusive franchise except with respect to the source of supply known as Three Mile creek, which he had purchased from the city. The Bienville Water Supply Company constructed its plant and supplied the city of Mobile with water under contracts, the last expiring July 1, 1900.

By the act of February 23, 1899, its charter was amended by striking out the word "exclusive," thus leaving a grant, but not an exclusive grant. By amendment to its charter the city of Mobile was granted authority to build or acquire water works, subject to the approval of its citizens by a majority vote. The approval was given. The Bien-

ville Water Supply Company did nothing towards purchasing or condemning the Stein franchise and property. After the amendment to its charter and the authorization by the popular vote, the city passed a resolution to purchase the Stein franchise and property, and undertook to arbitrate under the provisions of the Stein contract, but the arbitration was held illegal.

A bill was brought by the Bienville Water Supply Company against the city of Mobile, setting up the rights given it by the aforesaid acts of 1883 and 1885, constituting the charter of said company, and contending that the legislation authorizing the city to build water works and the steps taken therein were in violation of the contract clause of the constitution. The constitution of Alabama gave the General Assembly the power to alter, revoke, or amend any charter of a corporation, and forbade the General Assembly from passing any law making any irrevocable grants or special privileges and immunities. The supreme court held that the plaintiff took its charter with notice that it was not given the exclusive right of supplying the city of Mobile with water, and that it had not at the time of the transactions obtained that which its charter before amendment purported to authorize it to obtain, to wit, the exclusive right to all sources of supply within the county. The court upon this subject quote a decision of the supreme court of Alabama.

The court say :—

" It cannot be pretended that, in granting a charter to the complainant company in 1883, the legislature conferred on that company any exclusive privilege of supplying the city of Mobile and its inhabitants with water. *All rights not exclusively granted to the complainant were reserved*, and the rights thus reserved included the granting of a franchise to another corporation to carry on the same business in the same territory. While the effect of granting such a franchise, afterwards, to the city, might be to impair and possibly by fair competition to ultimately largely destroy the value of complainant's plant, it would not be in excess of legisla-

tive power to grant the franchise to the city, nor would it in anywise infringe the Federal Constitution, prohibiting a State legislature from passing laws impairing its obligations. *If there is no contract, there is nothing in the grant on which the constitution could act.* The element of a contract by the State with the complainant company did not enter into the grant of its franchise to establish and operate a system of water works in Mobile."

186 U. S., 212, Bienville Water Supply Co. *vs.* Mobile, pp. 218 and 219 of the opinion.

And in that connection, as construing what was meant by the charter, the court quotes and discusses the provision of the constitution of Alabama touching irrevocable grants and special privilegess or immunities.

It will be seen, too, that the *irrevocable grant* that the court referred to was the grant of the right to acquire an *exclusive franchise in the future*, which had not been acquired up to the time that the charter was amended. It is a familiar principle that up to the time that a corporation acquires property and spends money or does some other equivalent act under the franchise granted it the franchise is not irrevocable. Up to the time that the franchise is exercised it is a mere license, and the State may withdraw the privilege by an amendment to the charter.

As has been held in the case of such grants to railroad companies, "*the railroad company has no vested right in the continuance of the municipal power to confer a benefit.*"

15 Am. & Eng. Ency. of Law, 2d ed., p. 1036.

Up to this time the franchise does not acquire its character of a vested right which can be impaired. When, however, a power or franchise of this kind has been actually exercised and contract rights or other property rights actually acquired under it, then such right becomes irrevocable, notwithstanding a power reserved in the constitution to amend a corporate charter. As the rule is stated in the work already quoted, in discussing the re-

served power to amend or repeal corporate charters or grants of privileges:

"But contracts between corporations and third persons cannot be impaired, nor can property actually acquired by the corporation be divested under the reserve of the power to amend or repeal. The amendment or repeal applies merely to future operations of the corporation and not past transactions. What has been done cannot be undone."

15 Am. & Eng. Ency. of Law, p. 1044.

In the case just quoted, Bienville Water Supply Co. *vs.* Mobile, 186 U. S., p. 212, the court distinctly recognizes that if the city had a subsisting contract, entered into during the time that the franchise was thus exclusive, and if the city were proposing to erect water works of its own, with a view of entering into competition with the water supply company, before the expiration of its contract, the exclusive franchise grant would have been irrevocable, notwithstanding the express provision of the charter that nothing should be considered to prohibit the organization thereafter of any other company for the purpose of supplying the city of Mobile with water, and notwithstanding the provision of the Alabama constitution that such grants shall not be irrevocable. *The grant that was held not to be irrevocable was the grant of a right to acquire an exclusive franchise not already acquired and of making exclusive contracts not already made. Up to the time that this was done no property right vested,* and therefore the legislature had the right to amend the charter. After a contract has been entered into no change in the charter could impair the exclusive feature of that contract. This case therefore has no application to the question under consideration. A charter is not in all cases a contract, and a franchise granted in a charter until acted upon does not acquire the quality of a contract. The right reserved by the legislature to amend a charter is a very different thing from the proposition that a city, having in consideration of valu-

able benefits entered into a stipulation that the plaintiff shall have certain rights or privileges, and the plaintiff having incurred expense in complying with its obligation, can afterwards refuse to be bound by its stipulations. There is nothing in the constitution or in the law which forbids the city, when it enters into a contract, from stipulating that it will continue to be bound by the contract and will not take part of it away and confer it upon another after the contractor has incurred the expense necessary for its full fulfilment.

The question of exclusive grant was fully and carefully considered by this court in the case of New Orleans Gas Company *vs.* Louisiana Light Co., 115 U. S., 650, and New Orleans Water Works Co. *vs.* Rivers, 115 U. S., 674.

In the case last cited this court holds:

"A legislative grant of an exclusive right to supply water to a municipality and its inhabitants through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee is a grant of a franchise vested in the State in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against State legislation to impair it."

115 U. S., 674, New Orleans Water Works Co. *vs.* Rivers.

"A legislative grant of an exclusive right to supply gas to a municipality and its inhabitants through pipes and mains laid in the public streets, and upon condition of the performance of the service by the grantee, is a grant of a franchise vested in the State, in consideration of the performance of a public service, and after performance by the grantee, is a contract protected by the Constitution of the United States against State legislation to impair it.

"In granting the exclusive franchise to supply gas to a municipality, a State legislature does not part with the police power and duty of protecting the public health, the public morals, and the public safety, as one or the other may be affected by the exercise of that franchise by the grantee.

"The prohibition in the Constitution of the United States

against impairing the obligation of contracts applies to the Constitution as well as the laws of each State."

115 U. S., 650, New Orleans Gas Company *vs.* Louisiana Light Company.

The opinion of the court thus clearly states the principle which controls contracts of this character:

"We have seen, the manufacture of gas, and its distribution for public and private use by means of pipes laid, under legislative authority, in the streets and ways of a city, is not an ordinary business in which every one may engage, but is a franchise belonging to the government, to be granted, for the accomplishment of public purposes, to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and means a public necessity for which the State may make provision."

Ibid., 115 U. S., 650, p. 669 of opinion.

In Citizens' Water Co. *vs.* Bridgeport Hydraulic Co., the supreme court of Connecticut deal with a contract granting the exclusive right to supply a city with water. The ruling there made is thus stated in the syllabus:

"In 1853 the common council of the city of Bridgeport accepted a proposition made by one G. to supply the city with water, and granted him (with a right of assignment) the exclusive right to lay pipes in the streets so long as a full supply of pure water should be furnished. In 1857 the Bridgeport Hydraulic Company was incorporated with power to acquire, and which did acquire, all the rights of G., under the vote of the city, and became charged with all his duties; and this company soon after expended a large sum of money in acquiring property and establishing its water works. Held, that so long as this company supplied the city with an abundance of pure water, the legislature had no power to give another corporation the right to lay its pipes in the streets of the city for the purpose of supplying the city with water."

55 Conn. Reports, 1, Citizens' Water Co. *vs.* Bridgeport Hydraulic Company.

In that case the court further hold:

"By a clause in the charter of the defendant company the legislature reserved the power to regulate the franchise at its pleasure. Held that this provision did not authorize the legislature to set aside or impair the contract which the city had entered into for the exclusive use of its streets by the defendant company, so long as it should supply the city with water, and which the charter had recognized and confirmed."

Ibid., 55 Conn. Reps., 1.

In the reply to the suggestion that the contract created a monopoly, the court merely observed:

"Communities may endure monopolies but they cannot endure the violation of contracts."

Ibid., 55 Conn. Reps., 1, Citizens' Water Co. *vs.* Bridgeport Hydraulic Company, page 16 of opinion.

VII.

We believe we have shown that the above-cited section of the constitution of the State of Georgia has no application to contracts like the present.

If, however, it were conceded that its provisions are applicable, we are unable to see how it would lend any support to appellant's contentions.

The constitution does not say that special privileges or immunities shall not be granted.

Nor does it say that a law granting special privileges or immunities shall not be passed.

It merely says they shall not be irrevocable.

Why irrevocable, if they could not be granted at all?

But the succeeding paragraph of the same section distinctly recognizes that special privileges and immunities may be granted.

For it declares: "No grant of special privileges or immunities shall be revoked, except in such manner as to

work no injustice to the corporators or creditors of the incorporation."

Const. of Ga., art. 1, sec. 3, par. 3; Civil Code, § 5731.

The constitution therefore recognizes that special privileges or immunities may be granted.

We all know that they are granted by the State and the various municipalities of the State.

Every railroad, every telegraph or telephone company, every gas, water, or electric light company, every street railway, every mining company, and many others, possesses some special privilege or privileges, not enjoyed by the public at large.

And so far is the protection of property in special privileges carried by our courts that a mere parol license cannot be revoked after the licensee has acted thereon and thereby incurred expense.

113 Ga., 481, Atlanta Railway & Power Co. *vs.* Atlanta Rapid Transit Co., pp. 491, 492.

12 Ga., 239, Mayor and Council of the City of Macon *vs.* Franklin.

71 Ga., 107, City of Atlanta *vs.* Gas Light Co.

72 Ga., 800, Mayor, etc., of Athens *vs.* Georgia Railroad.

The constitution of our State, even in the matter of reserving the State's legislative control over corporate charters, was careful to safeguard the reservation against danger of abuse.

Still less will it permit a contract in the more limited sense—a bargain for the purchase of an article of necessity, fairly and honorably made, and performed by the other party at great expense—to be repudiated under the claim that it was revocable, at the pleasure of the one party, to the ruin of the other party, upon whom it was obligatory for twenty years without right or power of revocation on the part of the latter.

The constitution in the same section declares that there shall be "no bill of attainder, *ex post facto* law, retroactive law, or law impairing the obligation of contracts" (par. 2, *supra*); and that "no grant of special privileges or immunities shall be revoked except in such manner as to work no injustice to the corporators or creditors of the incorporation" (par. 3, *supra*).

The clause appears in good company. *Noscitur a sociis.* It was the purpose of the framers of that instrument to protect the sanctity of public as well as private contracts; to rigorously uphold good faith and honest performance: not to invite and sanction repudiation upon any pretext; not to delare that he who entered into an onerous undertaking with State or municipality, and incurred large expense in order to faithfully perform on his part, must reckon it a special privilege to hold the State or city's promise that he would not be destroyed so long as the State or city might continue in an amiable mood, but that the promise was not binding, because it was a part of the contract that the State and its cities, towns, and villages should possess at all times the right of revocation.

The revocation must "work no injustice."

The State may, perhaps, exercise its right of eminent domain, for water supply is a public purpose.

115 U. S., 650, New Orleans Gas Co. *vs.* Louisiana Light Co., 673.

But this must be subject to the requirement found in this same section of the constitution:

"Private property shall not be taken or damaged for public purposes, without just and adequate compensation being first paid."

Const. of State of Georgia, art. 1, sec. 3, par. 1.
Civil Code, § 5729.

All these provisions are to be construed in accordance with the spirit of the instrument, as announced in the first section of the first article:

"Protection to person and property is the paramount duty of government, and shall be impartial and complete."

Const. of Ga., art. 1, sec. 1, par. 2; Civil Code, § 5699.

VIII.

It was suggested by counsel for the appellant, in the oral argument, that paragraph 3 of section 3, article 1, of the constitution of Georgia, viz., "No grant of special privileges or immunities shall be revoked, except in such manner as to work no injustice to the corporators or creditors of the incorporation," refers only to grants before the constitution went into effect.

Then, it may be asked, to what does the word "irrevocable" in the preceding paragraph of the same section refer? Why "irrevocable" if the special privileges cannot be granted at all?

But we think the fallacy of this suggestion will be seen at a glance.

Grants already made before this reservation by the State of the right to revoke would be protected by the impairment-of-contract clause of the Federal Constitution, and could not be revoked for want of power in the State, and the constitution would not have done the idle thing of defining and limiting the exercise of a revocation which could not be exercised at all.

But, aside from this, it is, we think, an elemental rule of interpretation that words occurring in the same instrument, in the same section of that instrument, and in immediate juxtaposition, must be understood in the same sense, when there is nothing to suggest that they were used in a different sense, and especially when such sense is that which the words naturally bear.

In the constitutions of some of the States the proviso which paragraph 3 annexes to the reservation in paragraph 2, section 3, article 1, of the Georgia constitution is found in the same clause and the same sentence with the balance of the reservation. Such is the case, for instance, with the constitution of Mississippi already quoted.

> Miss. Const., art. 7, sec. 178, Thompson, Dillard and Campbell's Annotated Code of Mississippi, p. 70.

And, indeed, without such proviso, in express terms, it would seem that the courts would read into the instrument something very much like it, upon the principle that it is to be presumed that the framers of the instrument and the people who adopted it did not intend to make possible rank injustice and confiscation of property.

Thus the reservation in the Iowa constitution, already quoted, contains no such proviso.

> Constitution of Iowa, art. 8, sec. 12, "Amendment or Repeal of Charters; Exclusive Privileges." [Annotated Code of Iowa, 1897, p. 101.]

The annotator appends to the section this note:

"Even though the power to regulate franchises is here reserved to the legislature, yet it would seem that such regulations must be reasonable or they will be invalid, (citing) Des Moines *v.* Des Moines Water Works Co., 64 N. W., 269."

> Annotated Iowa Code (1897), p. 101; note under art. 8, sec. 12, of constitution.

The cited case is in the official reports, 95 Iowa, 348, Des Moines *vs.* Water Co.

By the statute of Iowa it was provided that the councils of certain cities should have power to fix charges for furnishing water, and that the act "shall not be construed to authorize the passage of an ordinance or resolution or the

making of any contract whereby the above powers are abridged."

It was claimed that under this statute and the constitutional provision above cited the city had the absolute power of fixing rates.

The court in the opinion say:

"There is no doubt of the powers of the State to regulate the compensation to be paid to corporations in the exercise of a public service or employment, in the absence of any schedule of prices fixed by an arrangement in the nature of a contract. * * * But no court has ever yet announced the doctrine that the regulation of rates may be such as would be unreasonable or unjust. * * * It is to be remembered that the property of the water company is not mere commodity, which can, without material cost, be transplanted, and put in operation elsewhere. Its value consists largely in the matter of its location, and in the more than sixty miles of water pipes laid below the frost line in the city, and in machinery and appliances which are of value mainly because of the present uses to which they are applied."

95 Iowa, 348, Des Moines *vs.* Water Co., pp. 362, 363, 364.

IX.

We think, therefore, it was within the power of the city to make a contract for the entire supply of water for public purposes, including within that term water for fire protection and for domestic and sanitary purposes, and that the exclusive right granted by the contract is valid in its entirety for the life of the contract.

If not valid in its entirety and to the full extent of the import of the words taken literally, it is, nevertheless, to be upheld to the extent such grant was permissible.

For where a water-works contract is valid in part, and the water company has at expense complied with its part of

the obligation, the contract will be upheld and enforced to the extent the same is valid.

91 N. W., 1081, Cedar Rapids Water Co. *vs.* City of Cedar Rapids.

Same case, 117 Iowa, 250.

65 Northeastern Reporter, 1063, City of Valparaiso *vs.* Valparaiso City Water Co.

Cites 96 U. S., 341, Hitchcock *vs.* Galveston.

It will, we think, be convenient at this point to consider the language used with reference to the exclusive feature of the contract.

The contract in three different places uses words of exclusive grant.

For purposes of convenience the contract will be discussed as if made direct to the water works company, as it provides that the company shall be organized and incorporated, and that the contract was then to have the same force and effect as though that company had originally entered into it and signed it. This was done.

By section 1 the city grants to the company "the exclusive right and privilege for the period of ninety-nine years, of constructing, maintaining and operating a system of water works for the purpose of supplying said city and its inhabitants with water for protection against fire and for domestic, sanitary and other useful purposes."

Record, p. 288.

It will be noted that the term there named is 99 years, but by the contract the city only obligated itself to take and pay for the water for 20 years. This clause would, therefore, be construed to mean that the company was to have such exclusive right as long as the city might see fit to take and the company see fit to furnish water under that same contract, after the original 20 years had expired.

If, however, the right be not held valid for any part of the time after the 20 years, that would not prevent its being valid for the 20 years.

The second section of the contract provides:

"That the said company *for the purpose of constructing, maintaining, operating and repairing said system of water works shall have the sole and exclusive privilege and full power, right and authority to lay water pipes and mains along any and all the streets and avenues of said city, as the same are now open or may hereafter be extended,* and to that end shall have full right to dig ditches or trenches in the streets of said city, etc."

Record, p. 288.

This exclusive right, if valid, is as extensive as the purposes for which the same is expressed to be given. As the company bound itself to maintain and operate the system for 20 years, this period necessarily defines the extent of the duration of the exclusive right, unless forfeited as elsewhere provided in the contract.

Upon the same principle of construction this section also makes clear the extent of the scope of the exclusive grant.

By section 5 the company covenants that it "shall extend its mains and pipes, enlarge its plant, and generally enlarge its system from time to time to meet increasing demands consequent upon the growth of the city" (Record, p. 289). The express purpose of the exclusive right (sec. 2) being for the "constructing, operating, *extending* and repairing" of the system, and, the company being under obligation to extend as increasing growth increased the city's needs, the exclusive right granted reached and extended to all water for fire protection and domestic purposes that the city and its inhabitants might use or need in the future during the 20 years, as well as their present uses and needs.

Section 4 provides, *inter alia:*

"The said company and their successors and assigns, shall be and are required from the completion of their system of

water works, until their charter shall cease, to furnish a sufficient supply of water for the purposes before and hereinafter mentioned, unless prevented by unavoidable and providential causes; in such event they shall be allowed a reasonable time to make repairs, and if after such reasonable time has been allowed they should still fail to furnish said supply of water, their contract from that fact [shall] be forfeited" (Record, p. 289).

In Georgia a contract of this character runs for 20 years, with the privilege of renewal at the end of that time; and the contract elsewhere names 20 years as the time the contract was to run.

The company having thus, under pain of forfeiture, undertaken and agreed to furnish all the water that would be needed and used during 20 years, extending its system as increased water consumption might require, and the city having agreed that the water company should alone supply water during that period, and should have the exclusive right of laying water pipes and mains for such purpose, the contract is, therefore, a contract by the city with the company for its exclusive supply, both for fire protection and for the use of its inhabitants, unless the court should hold that the city has no right to contract for its exclusive supply, which is here the exact equivalent of its entire supply, for either or both of those purposes.

The contract on this point is express, clear, and unmistakable. There is no room for doubt as to what the parties intend. The contract does not require a second, or even a close, reading to arrive at its meaning and intention.

The inquiry would seem to narrow itself down to this: Does a city, vested with the right to contract with a water company for water supply for fire protection and for the domestic use of its inhabitants, have the right to contract for its entire supply? Or must it contract for some part of its supply, less than the whole, in order that the contract may be valid? And if the contract, in order to be

valid, must be for less than its entire supply, then for how much less than the whole is it requisite that the contract should be, in order for the courts to sustain its validity?

Section 10 of the contract declares:

"That full assent is hereby given to a charter to be granted by the legislature of the State of Georgia to the said R. L. Bennett and associates, their successors and assigns, or to be obtained by them under the general incorporation laws of said State, incorporating them into a body corporate under the title of the Dawson Waterworks Company, and *granting to said company the exclusive right to construct, maintain and operate a system of water works in said city of Dawson, for the purpose of supplying said city, its inhabitants, citizens and residents with water for protection against fire, and for domestic, sanitary and other useful purposes.* * * *"

(Rec., p. 290.)

The general incorporation law of Georgia referred to in this section of the contract, and under which the water works company was in fact incorporated pursuant to the contract, does not require or provide for a detailed and specific enumeration of the proposed rights and purposes of the corporation. It requires a statement of the general purpose of the proposed corporation and of the character of the business it proposes to carry on; and its powers under this general act are broad enough to embrace all those mentioned in the contract, including the part above quoted, or requisite to the carrying out of its purposes and provisions.

Contracts are to be interpreted according to the intention of the parties, as manifested by the language used. The language above quoted manifestly indicates and declares that it was the intention of the city that the water works company should have during the life of the contract "*the exclusive right to construct, maintain and operate a system of water works in said city of Dawson, for the purpose of supplying said city, its inhabitants, citizens, and residents with water for protection against fire, and for domestic, sanitary and other useful purposes.*" The law, which looks at substance rather than

form, will therefore, we think, interpret this provision of the contract as a declaration on the part of the city that the company should have such exclusive right for the purposes expressed. Taken in connection with the parts of the contract which precede it, and which make it the duty of the water company to furnish all the water the city and its inhabitants should require, it fairly constitutes an agreement on the part of the city that the company was to have the exclusive right to furnish the water which it obligated itself to furnish, namely, all that the city and its inhabitants should use or require. Differently stated, this provision merely makes the obligations of the contract touching a full supply, present and future, reciprocal, mutual, and equally binding on both parties.

X.

That a city having the right to contract for water for fire protection may validly contract with a water company for its entire supply for such purpose would seem to be clear.

That the use of the word "exclusive" in that connection means neither more nor less than "entire" seems equally clear.

A fair and rational construction of the contract would seem to leave no doubt that whatever else the parties may have attempted to stipulate they at least stipulated, and had the right to stipulate, that the water company was during the life of the contract (20 years) to furnish the city and the city was to take from the water company all of its water for fire protection. If the city had the right to stipulate that it would buy all its water for this purpose from the water company it had the right to stipulate that the water company should have the exclusive right to furnish it, for the two forms of expression mean precisely the same thing.

If the city had the right to contract with the water company for its entire supply for this purpose, then it undoubt-

edly had the right to stipulate that it would not embark in he business of doing what it had agreed the other party should have the exclusive right of doing, namely, supplying it with water.

A party certainly may as a guaranty of good faith stipulate that it will not threaten or prepare to do what it has agreed not to do, particularly when such preparation involves a waste of public treasure, to be made good by taxpayers, one of whom is the other party, and where the other party in order to be in a position to carry out its obligation needs unimpaired credit, which such threatened action will destroy and needs the revenue, which the other party owes and is diverting in making such preparation.

A city in making a contract "can hedge it about with limitations designed to do little more than bind the city to carry out the contract in good faith, and with decent regard for the rights of the other party."

172 U. S., 1, Walla Walla City *vs.* Walla Walla Water Co., p. 18.

It was, however, suggested by counsel for appellant, in his concluding argument, that while, perhaps, a city may contract with a water company for its exclusive water supply for fire protection, it has no right to grant the exclusive right of supplying water for the use of its inhabitants for domestic purposes.

In passing, it may be proper to remark that if this proposition be pushed to its last analysis it would seem that it must be conceded that to the extent that it enjoins the city with supplying itself with water for fire protection, and building works, incurring expense of fire hydrants, requisite fire pressure, increased size of mains, etc., for that purpose, the grant of an injunction was proper, and if the city cannot build water works for that purpose, then, without permitting it to commit a breach of trust in the use of public money for a use not authorized by law, the city cannot be permitted to

build water works for any purpose; for in order to authorize a bond issue the purpose must be specifically declared, advertised, and voted on, and the money can be used for no other purpose. The voters voted for an issue for the purpose of buying or constructing water works for fire protection as well as domestic supply, and not the latter only.

We are unable, however, to see any sound or rational ground for the distinction sought to be drawn by the learned counsel between these two different purposes.

If the city has the right to provide a water supply equally for both purposes, and a contract with a water company is an authorized way of making such provision, then we cannot see why the contract so made, in the exercise of its undoubted power, does not bind the city, so far as it attempts to deal with the one purpose, to the same extent that it binds it when it attempts to deal with the other.

Water supply for its inhabitants is a public purpose, within the scope of the city's powers; otherwise the city would have no right to pay out the public money raised by taxation for such purpose; nor would the city have the right to issue bonds and levy taxes to pay interest and principal of the bonds for such purpose unless it was a public purpose, vested in the municipality and within its control, every whit as much as water for fire protection.

Wholesome water, in ample quantities for drinking, cooking, and other domestic purposes, is a necessity in the more crowded conditions that exist in the cities; health and comfort make this a municipal purpose, perhaps, second to none other in importance, not even the extinguishment of fire. It is for such purposes municipal government is established. We are aware of no authority which places the two purposes upon any different footing, or holds that the power of the municipality is any more circumscribed in the case of supply for one purpose than in the case of the other.

It seems to be hardly a sound proposition that the city has the right to contract for water supply for its inhabitants;

bind the other party to furnish water to every inhabitant in ample quantities; require the other party to incur great expense in the purchase of engines, pumps, machinery, the erection of water tower, the laying of pipes, the equipment of a plant amply to supply all water, calculated according to the needs of all—upon pain of forfeiture if the quantity furnished proves insufficient—but that the city is without power to stipulate that the company shall have the right to do what it is required to do, namely, furnish the inhabitants water, and all the water that they shall use; that such a contract binds only the party upon whom the burden falls; that the city is without power to stipulate that it will not itself enter into ruinous competition with the water company and destroy the property which the water company has invested in order to carry out its undertaking.

XI.

Counsel for appellants cite and rely on The City of Joplin vs. Southwest Missouri Light Company, 191 U. S., 150.

The court in that case merely hold that an exclusive right or franchise to furnish water is not to be implied where there is no language expressing or indicating the intent to grant the exclusive right. It was in that case argued that, although the grant was not exclusive in terms, yet the court would treat it as exclusive for the reason that competition on the part of the city might cause great loss and damage to the light company. The court hold that the only safe rule is to look to the language of the contract itself to determine the intention of the parties, and that it is not permissible to read into the contract stipulations that are not to be found therein; and the court point out that it would be against public policy to imply grants where there is no language to authorize the presumption that any was intended, and that such a rule, assuming the existence of the intention based upon speculation merely, without language to sustain it, would be

altogether too far-reaching and important in its consequences to be adopted by the court as a rule of construction.

The conclusion of the court is summed up in the following language:

"It is by implication from the statute and the ordinance passed under it, not from the explicit expression of either, that the conclusion is deduced that the city is precluded from erecting its own lighting plant, and yet it is conceded that the grant to the appellee is not exclusive. That is, it is conceded that the city has not exhausted its power under the statute by the grant held by the appellee, but may make another to some other person than the appellee. In other words, that the city may make a competitor to appellee, but cannot itself become such competitor. The strength of the argument urged to support * * * the distinction is in the consideration that competition by the city would be more effective than competition by private persons or corporations—indeed might be destructive. The city, it is further urged, could be indifferent to profits and could tax its competitor to compensate losses. But this is speculation and it may be opposed by speculation, and there are besides countervailing considerations. The limitation contended for is upon a governmental agency, and restraints upon that must not be readily implied. The appellee concedes, as we have seen, that it has no exclusive right, and yet contends for a limitation upon the city which might give it (the appellee) a practical monopoly. Others may seek to compete with it, and if the city cannot, the city is left with a useless potentiality while the appellee exercises and enjoys a practically exclusive right. There are presumptions, we repeat, against the granting of exclusive rights and against limitations upon the powers of government."

191 U. S., 150, City of Joplin *vs.* Southwest Missouri Light Company, pages 156, 157, of opinion.

We cannot see how this case has any possible application to the case at bar. In the case at bar the intention of the city not to enter into competition with the water company is shown by language express, clear, and of unmistakable import.

XII.

The controlling principle in cases like the present is so clearly laid down and forcibly stated by this court in the case of Walla Walla *vs.* Walla Walla Water Company, 172 U. S., 1, that it seems that nothing remains to be added. In that case, in construing a contract where the language used was much less strong than in the case at bar and where the constitution of the State contained provisions against the grant of exclusive franchises not to be found in the constitution of our State, the court point out the fundamental distinction between exclusive franchise in the true acceptation of the term and stipulations in a business contract like the present, amounting to more than that the city will take all its water from the water company and will not directly, by itself or through contract with another water company, enter into competition with the contractee water company for the supply of water which the parties expect and require such water company to fully meet and provide for the entire wants of the city and its inhabitants. As the court say :

"An agreement of this kind was a natural incident to the main purpose of the contract, to the power given to the city by its charter to provide a sufficient supply of water, and to grant the right to use the streets of the city for the purpose of laying water pipes to any persons or association of persons for a term not exceeding twenty-five years. In establishing a system of water works the company would necessarily incur a large expense in the construction of the power-house and the laying of its pipes through the streets, and as the life of the contract was limited to twenty-five years, it would naturally desire to protect itself from competition as far as possible, and would have a right to expect that at least the city would not itself enter into such competition. It is not to be supposed that the company would have entered upon this large undertaking in view of the possibility that in one of the sudden changes of public opinion to which all municipalities are more or

less subject, the city might resolve to enter the field itself—a field in which it undoubtedly would have become the master—and practically extinguish the rights it had already granted to the company. We think a disclaimer of this kind was within the fair intendment of the contract, and that a stipulation to that effect was such a one as the city might lawfully make as an incident of the principal undertaking."

172 U. S., 1, Walla Walla *vs.* Walla Walla Water Company, pages 17 and 18 of opinion.

As the court point out, a city in the exercise of an undoubted power to make a particular contract can hedge it about with limitations binding the city to carry out the contract in good faith and with decent regard for the rights of the other party.

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XIII.

We think, however, that the contention urged by the city is not one which commends itself for fairness or the strictest of good faith, as the city well knows and as the evidence makes plain the city's purpose is not to erect water works for purposes of municipal supply other than the hydrants contracted for in this contract. On the contrary, the city conceived its scheme to build municipal water works only after it had by ordinance repudiated its contract and declared that it would no longer be bound thereby, and the question was submitted to the voters, not upon the theory that the city would continue to accept and pay for its fire protection, but for a proposed municipal water plant would supply water for all purposes and dispense with the necessity of the city's further paying the water works company for water. After the authority to issue bonds was voted the city held the matter in abeyance for five years for the purpose of first ascertaining whether it could uphold its

repudiation of the present contract, and only elected to proceed after it had satisfied itself that it could successfully carry out its purpose of repudiation. Under these circumstances the city's contention that it should be permitted to go ahead and erect water works upon the theory that this is not inconsistent with its obligation to accept and pay for this water furnished by the present company does not seem to be founded in perfect candor either to the court, the water company, or the taxpayers, who have authorized the bond issue. The city's position differently stated would seem to be about this: That it will split up its proposed purpose of repudiation in pieces smaller and lighter and easier to handle than the whole if carried at one time, and thus reach by easy stages its final destination of complete repudiation of its contract and the utter destruction of property rights of these bondholders.

XIV.

Addenda.

On the oral argument it was suggested by counsel for appellant that the action taken by the city council of June 27, 1894, is not to be regarded as an ordinance, but a resolution.

It will be seen by an examination of the city's charter that nothing is said about the city's passing any resolutions, but all official action in city council would seem to be regarded as by-laws, ordinances, or else rules and regulations for the internal management of its affairs. We think, however, under the decisions that it is to be determined not from form but from substance whether particular action is to be regarded as an ordinance or a resolution. There is no requirement of formality in the case of the passage of an ordinance different from that in the case of a resolution. 'Where the resolution is passed with all the formality of an

ordinance, it thereby becomes a legislative act, and it is immaterial whether called an ordinance or a resolution."

McQuillin, Municipal Ordinances, p. 6.

And see numerous decisions, State and Federal, cited in note 8.

The action taken on June 27, 1894, whether styled resolution or ordinance, was action destructive of contract rights—action which has formed the basis of the city's constant course of conduct from that time to the present. It was on the basis of this resolution or ordinance that the city has declined to levy any more taxes, although the original ordinance, constituting a contract, provided in express terms that it should levy such taxes. The original contract is an ordinance, and if the later action declining to carry it out is to operate as a repeal of the ordinance requiring the city to levy taxes and make payments, it is hard to see how the later action is to be regarded as of a less solemn character than the earlier.

Whatever may be the character, however, of the ordinance or resolution of June 27, 1894, there can be no question as to the legal status of the ordinances of November and December, submitting to popular vote the question of issuing bonds to build municipal water works and ordering the issuing of bonds for such purpose and the building of municipal water works therewith. Such submission to popular vote is not only an exercise of the city's law-making power, but constitutes law-making of the most solemn character possible under our Constitution. It calls into joint operation the law-making power of the city council and the citizen body making up the corporation.

XV.

In the oral argument it was suggested that the decision of the State court in the Dawson Water Works case is *res adjudicata* because, as appellant contends, the right to collect

these rentals was not completely vested in the trustee until after the decision in that case was rendered. Without discussing the legal merit of this contention, it is sufficient to say that under the facts found by the master, namely, that the city continued to use the water, the city is bound to pay these rentals under the decision in the Dawson Water Works case (106 Ga., 696, referred to).

We think, however, the question of *res adjudicata* is disposed of by adverting to the elementary principle that every person having a right or claim of any character whatsoever is entitled to his day in court, and no judgment in a case to which he is not a party can bind him unless his rights are acquired after the action is brought.

After stating the well-recognized rule that judgments only bind parties and privies, Mr. Black, in his work on Judgments, defines privity within the meaning of this rule stating that to create this relationship two requisites must exist:—

"In the first place the person who is thus to be connected with the judgment must be one who claims an interest in the subject affected through or under one of the parties. * * *

"In the second place, privies, in such sense that they are bound by the judgment, are those who acquired an interest in the subject-matter *after the rendition of the judgment.* If their title or interest attached before that fact they are not bound unless made parties."

2 Black on Judgments, section 549, pp. 831, 832.
See also Freeman on Judgments (3d edition), section 162, pp. 177, 178.

In Keokuk and Western Railroad Company *vs.* Missouri, 152 U. S., 301, the court hold that:

"A mortgagee is not bound by judgments or decrees, against the mortgagor in suits begun by third parties subsequent to the mortgage, unless he or his representative is a party to the litigation."

In discussing the question the court say (page 134 of opinion):

"While a mortgagee is privy in estate with a mortgagor as to actions begun before the mortgage was given, he is not bound by judgments or decrees against the mortgagor in suits begun by third parties subsequent to the execution of the mortgage, unless he or some one authorized to represent him, like the trustee of a mortgage bondholder, is made a party to the litigation, although it would be otherwise if the mortgage was executed pending the suit or after the decree."

And see the discussion in that case and the authorities cited.

It would seem that nothing could be more clear than the rule thus stated. If the mortgagor in a case like the present can by anything that he does or omits to do destroy the rights of these bondholders, then precarious indeed would be the rights of all purchasers of this character of security; and if a form of security which is supposed to have the right of protection by the courts in the highest degree can be thus destroyed in litigation between other parties of which neither the bondholder nor his trustee has any knowledge, then these securities would hardly be worth the paper on which they are written.

The rights of bondholders stand at the basis of our entire industrial system, and it is through the issue of this class of securities that every section and every kind of enterprise have been developed. The courts have always afforded to bondholders the fullest measure of protection. We need not cite authorities in support of this proposition.

XVI.

The question of the correct interpretation of the Georgia constitutional limitation on the subject of municipal indebtedness is dealt with in our main brief. In addition to

what is there stated, we think it proper here to note the fact that upon comparison the section of the Georgia constitution referred to seems to be copied from the constitution of Iowa, article 11, section 3, which, it would appear, is the oldest constitutional provision to be found on the subject (Annotated Iowa Code, 1897, page 105).

The date of this constitution is March 5, 1857. At the June term, 1873, the supreme court of that State in Grant against The city Davenport, 36 Iowa, 396, construed the meaning of the term "debt" as used in this constitutional provision, as follows:

"Where a contract made by a municipal corporation pertains to its ordinary expenses, and is, together with other like expenses, within the limits of its current revenues and such special taxes as it may legally, and in good faith intends to levy therefor, such contract does not constitute the 'incurring of indebtedness' within the meaning of constitutional provision limiting the power of municipal corporations to contract debts.

"A contract entered into by the city with a company for the supply of water to the city for a term of years by such company, who was to receive a certain annual rate therefor, is one related to the ordinary expenses of the city, and the rate agreed to be paid is not an indebtedness prohibited by the constitution."

This construction of the Iowa constitution became a part of the meaning that instrument bore at the time its provision, in substantially identical language, was adopted by the framers of the Georgia constitution, and it is therefore fair to assume that it was the purpose to adopt the provision as construed by the courts of the State at the time.

Respectfully submitted,

JOHN I. HALL.
OLIN J. WIMBERLY.

FILE COPY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 154.

THE CITY OF DAWSON, APPELLANT,

v.

THE COLUMBIA AVENUE SAVING FUND, SAFE DEPOSIT, TITLE AND TRUST COMPANY.

PETITION OF APPELLEE FOR REHEARING AND BRIEF IN SUPPORT THEREOF.

JOHN G. JOHNSON,
JOHN I. HALL,
OLIN J. WHEELER,
Counsel for Appellee.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 1904

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PETITION FOR REHEARING.

The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company, appellee in the above-entitled cause, prays for a rehearing on the following grounds:

I.

This court holds that the case at bar is governed by St. Paul Gaslight Co. *v.* St. Paul, 181 U. S., 142, 150, and not by Walla Walla *v.* Walla Walla Water Co., 172 U. S., 1. After pointing out that "undoubtedly the decisions on the two sides of the lines are very near to each other," the court draws the distinction between the case at bar and the Walla Walla case, and Vicksburg Waterworks Co. *v.* Vicksburg, 185 U. S., 65, in the following words:

"In the case before us there was no legislation subsequent to the contract, and it is not even shown that there is color of previous legislation for the city's acts."

Through failure of counsel for the appellee to point out clearly in the argument or the brief the Georgia statutes and decisions upon this point, the color of previous legislation for the city's acts was not brought to the attention of the court, as could have been done.

The charter of the city of Dawson (act of the General Assembly of Georgia, approved September 21, 1883, set out in the printed Record, pp. 220–226) provides:

"SEC. 6. *Be it further enacted*, That the said mayor and aldermen shall have power and authority from time to time, to make, ordain and establish such by-laws, ordinances, rules and regulations, as shall to them appear necessary and proper for the security, welfare, convenience and interests of said city of Dawson, and the inhabitants thereof, and for preserving the health, morals, peace, order and good government of the same, and not inconsistent with the constitution and laws of Georgia."

Under the uniform decisions of the Georgia courts this "general welfare clause" of the city's charter is legislation authorizing the city to provide a water supply for fire protection and for the domestic use of its inhabitants, either by contract with a water company or by itself building its own works by holding a bond election and issuing bonds to defray the cost of construction or purchase, as the city attempted to do in the present case.

In City of Dawson *v.* Dawson Waterworks Company, 106 Ga., 696, 709, the supreme court of Georgia say, with respect to the power of the City of Dawson under its aforesaid charter:

"That a municipal corporation may exercise the power of taxation for the purpose of providing its inhabitants with water for domestic use, as well as to provide the city with water to protect the inhabitants from fire, is the settled law of this State and is not questioned in the present case. (Citing) Frederick *v.* Augusta, 5 Ga., 569; Rome *v.* Cabot, 28 Ga., 50; Wells *v.* Atlanta, 43 Ga., 67. A supply of water for these purposes may be procured by a municipal corporation

either by building itself the works necessary for the purpose, or by making a contract with other persons to supply the same" (p. 709 of opinion, 106 Ga.).

And in Heilbron *et al. v.* The Mayor and Council of Cuthbert, 96 Ga., 312, the supreme court held that under the general welfare clause of its charter a city has authority, upon complying with the requisite constitutional and statutory provisions (as was done by the city of Dawson in the case at bar), to issue bonds for the construction and maintenance of water works.

The city of Cuthbert, under a general welfare clause similar to that in the charter of Dawson (though somewhat less full), proceeded to hold a bond election to build its own water works under the same statutory and constitutional provisions which the city of Dawson acted under in the case at bar. Both cities took the same action, the only difference being that in the case of Cuthbert there existed no contract with a water company the obligation of which was impaired, and it was in that case held that there was legislation which not only was color for but fully authorized the city's acts.

We think, therefore, it is shown that there was color of previous legislation for the city's acts, and that the case at bar, therefore, falls squarely within the principal rules in Walla Walla *v.* Walla Walla Water Co., 172 U. S., 1.

II.

We think, too, because of the failure of counsel to bring to the attention of the court the extent of the power given the city of Dawson by the legislature, the court is incorrect in the conclusion that in the case at bar there was no legislation subsequent to the contract.

We think that, in view of the provisions contained in the statutes and clauses of the State constitution under which the city acted (and to which, unfortunately, counsel for appel-

lee failed to direct the court's attention), the city's acts authorized by the statutes which were thereby called into operation constituted legislation subsequent to the contract and in impairment of its obligation. That the ordinance of the city of Dawson calling for an election for the purpose of determining whether the city should incur a bonded debt for the purpose of building or purchasing a system of water works to be owned by the city, the election held under such ordinance, the ordinance declaring the result of the election to be in favor of incurring the bonded indebtedness, and the city's acts and its admitted purpose of carrying the ordinance into effect by issuing the bonds and constructing water works constitute legislation will, we believe, be clear when the provisions of the Georgia constitution and statutes are looked into.

Paragraphs 1 and 2, section 7, article 7, of the State constitution are as follows:

ARTICLE 7, SECTION 7, PARAGRAPH 1. "*Debt of Counties and Cities Not to Exceed Seven per cent.*—The debt hereafter incurred by any county, municipal corporation, or political division of this State, except as in this constitution provided for, shall not exceed seven per centum of the assessed value of all the taxable property therein, and no such county, municipality or division shall incur any new debt, except for a temporary loan or loans to supply casual deficiencies of revenue, not to exceed one-fifth of one per centum of the assessed value of taxable property therein, without the assent of two-thirds of the qualified voters thereof, at an election for that purpose to be held as may be prescribed by law; but any city, the debt of which does not exceed seven per centum of the assessed value of the taxable property at the time of the adoption of this constitution, may be authorized by law to increase at any time the amount of said debt three per centum upon such assessed valuation."

"PAR. 2. *County and City Bonds, How Paid.*—Any county, municipal corporation, or political division of this State, which shall incur any bonded indebtedness under the provisions of this constitution shall, at or before the time of so doing, provide for the assessment and collection of an annual

tax, sufficient in amount to pay the principal and interest of said debt within thirty years from the date of the incurring of said indebtedness."

Civil Code of Georgia (ed. 1895), §§ 5893, 5894 (vol. 2).

And article 7, section 10, paragraph 1, of the constitution is as follows:

ARTICLE 7, SECTION 10, PARAGRAPH 1. "*City Debts, How Incurred.*—Municipal corporations shall not incur any debt until provision therefor shall have been made by the municipal government."

Civil Code, § 5897 (vol. 2).

Section 377 of the Code of Georgia (vol. 1, page 123), being the same section cited in Heilbron *v.* The Mayor, etc., of Cuthbert as section 508*i* of older code, is as follows:

"377 (508*i*). *Notice of Election on Issue of Bonds.*—When any county, municipality or division shall desire to incur any bonded debt, as prescribed in paragraphs 1 and 2, section 7, article 7, of the constitution of 1877, the election required shall be called and held as follows, to wit: The officers charged with levying taxes, contracting debts, etc., for the county, municipality or division, shall give notice for the space of thirty days next preceding the day of election, in the newspaper in which the sheriff's advertisements for the county are published, notifying the qualified voters that on the day named an election will be held to determine the question whether bonds shall be issued by the county, municipality or division. In said notice he shall specify what amount of bonds are to be issued, for what purpose, what interest they are to bear, how much principal and interest to be paid annually, and when to be fully paid off."

The city therefore, in doing the acts complained of, was necessarily in the exercise of its powers of taxation. It could incur no debt without providing for the payment thereof by taxation. The voters in authorizing the debt were authorizing the tax. The one cannot be separated from the other. All matters relating to taxation, all matters relating

to the raising of public revenues and authorizing the expenditure of public moneys, are necessarily legislative in their character.

In *Heilbron v. Mayor and Council of Cuthbert*, 96 Ga., 312, *supra*, and *City of Dawson v. Dawson Waterworks Co.*, 106 Ga., 696, 709, *supra*, it is held that the city, upon complying with the above-quoted constitutional and statutory provisions, may exercise the power of taxation for the purpose of providing water for fire protection and the domestic use of its inhabitants.

Taxation, "whether exercised by the legislature itself or delegated by it to a municipal corporation, is strictly a legislative power" (125 U. S., 18, 31, N. O. Waterworks Co. *v.* Louisiana Sugar Refining Co., and cases cited).

That an ordinance "whereby the mayor was instructed to notify the water-works company that the mayor and aldermen deny any liability upon any contract for the use of the water-works hydrants and the subsequent action of the city in holding an election to authorize the issue of bonds to buy or construct water works of its own and in refusing to pay the amount due and payable under the terms of the ordinance do not present the mere case of a breach of a private contract to be remedied by an action at law, but disclose an intention and attempt by subsequent legislation of the city to deprive the complainant of its rights under an existing contract" (pp. 81, 82 of opinion in the Vicksburg case, 185 U. S.), is what we understand to be the distinct and express ruling of this court in *Vicksburg Water Works Co. v. Vicksburg*, *supra*, and such are precisely the averments and the proof in the case at bar.

That an ordinance whereby the city sought to build water works of its own, under color of legislation preceding the contract, and for such purpose called an election to authorize the issue of bonds to raise the necessary money, constitutes legislation, is what we understand to be the ruling in *Walla Walla v. Walla Walla Water Co.*, *supra*.

We think, therefore, that in the case at bar there was legislation subsequent to the contract, and that the case is governed by *Walla Walla v. Walla Walla Water Co.*, 172 U. S., 1, and *Vicksburg Water Co. v. Vicksburg*, 185 U. S., 65, and not by St. Paul Gaslight *v.* St. Paul, 181 U. S., 142.

This we have undertaken to point out with somewhat more fullness in the accompanying brief.

III.

This court in the opinion say:

"The bill presents a naked case of breach of contract. The first step of the city was to repudiate the contract and to refuse to pay. Whatever it may have done subsequently, its wrong, if, contrary to the decision of the supreme court of the State, there was a wrong, was complete then. The repudiation and refusal were kept up until the bill was filed and the other acts were subsequent, subordinate to and in aid of them."

We think that in this also the lack of a proper presentation to the court of the facts on this point has allowed the court to form a mistaken conclusion.

It appears that the ordinance of June 27, 1894, repudiating the contract was passed for the purpose of invoking a decision of the State court that the city had the right to build its own water works or purchase, if the water works company would sell at a ruinous sacrifice. We think it clearly appears the only purpose the city ever had in repudiating the contract was to provide a water supply by the alternative of the two modes, by which a city in Georgia may exercise the power of taxation for the purpose of providing water for fire protection and the domestic use of its inhabitants, namely, by municipal ownership of the works necessary for the purpose, instead of adhering to the contract with private parties, the method first adopted.

It appears that at the same time the city repudiated the contract it procured certain tax-payers to bring a bill for injunction against it, and the bond election was held back to abide the result of that suit. The case having gone to the supreme court of the State and been there argued, the election was called for a date which would allow time for a decision to be rendered in the usual course of things before the election. The decision not having been promptly rendered, the election was postponed and not held till after the court announced its decision.

It is shown by letters from the city to the water company and by the testimony of the mayor and aldermen, and nowhere denied, that it has from the very beginning been the city's purpose to substitute a system of water supply under municipal ownership, under section 377 of the Georgia Code, for the plan originally adopted of obtaining such supply by contract under Code sections 2407 *et seq.*, and that this has been the prime moving, controlling purpose which has shaped the city's course throughout.

We think, therefore, that, while the ordinances for issuing bonds and building or buying water works were subsequent in the order of time to the repudiation and refusal to pay, the former were not subordinate to or in aid of the repudiation and refusal to pay, but the repudiation and refusal to pay were subordinate to and in aid of the city's purpose of issuing bonds and owning its own water works.

Nor do we think the accompanying or precedent refusal to pay changes in any way the essential character of the city's ordinances, acts, and threatened action, in establishing water works of its own, in impairment, as we insist, of the city's contract obligation not to do so.

The purpose of owning its water works and supplying the water which the company was to supply is just as real, just as efficient, just as destructive of the rights and property of the other contracting party, whether such purpose be formed

earlier or later, whether it exists singly or in conjunction with some other purpose.

In either event the result reached is precisely the same.

The city's acts in ordaining to build or acquire and operate water works of its own, for the purpose of fire protection and of providing its inhabitants with their water for domestic use, impaired the right which by the prior ordinance constituting the contract the water company had of furnishing this fire protection and this water for domestic use, and diminishes the city's duty to accept and pay for the water for fire protection, and afford to the other party the unrestricted opportunity of furnishing the inhabitants with water for domestic use, to the great and manifest injury of the other party.

IV.

This court, in holding that the acts of the city do not make a case arising under the Constitution of the United States, makes no note of the fact averred in the bill (Rec., pp. 11, 12) and established by the proof that the city having by the contract obligated itself to pay for water furnished for certain specified municipal purposes by remitting city taxes, and the water company having complied with its part of the agreement, and furnished water averred to be reasonably worth the amount of the taxes that would have been otherwise exigible, and the city having accepted the water so furnished as full payment of all taxes, exactly as though the taxes had been paid to the city by the company and the like amount paid back into the hands of the company in payment for the water, yet the city thereafter, at the time of the other acts complained of and as part of its ordinance repudiating the contract, exacted, assessed, levied, and collected taxes for each of the years the contract had been in existence (1891–1894, inclusive), retaining the amount of the taxes

for those years out of the hydrant rental for the year 1894, paying the company the $2,000 less the amount of the taxes, and had assessed and was proceeding to levy and collect the tax for the year 1895 when restrained by injunction.

We think this constituted legislation in impairment of the obligation of the contract within the meaning of the constitution.

As held by this court in *New Orleans Waterworks Co. v. Louisiana Sugar Refining Co.*, 125 U. S., 19, 31, *supra*, "the power of determining what persons and property shall be taxed belongs exclusively to the legislative branch of the government, and, whether exercised by the legislature itself or delegated by it to a municipal corporation, is strictly a legislative power, (citing) *United States v. New Orleans*, 98 U. S., 381, 392; Meriwether *v.* Garrett, 102 U. S., 474."

As to the validity of such a provision in the contract, the rule laid down by the supreme court of the State is as follows:

> "While a city cannot exempt a gas company from municipal taxation, it can contract to pay for gas a stipulated sum per lamp, and in addition thereto, a sum for all the lamps supplied equivalent to the amount of taxes imposed upon the company, provided this additional sum is a fair and just allowance to compensate for the actual value of the light service, and the stipulation is *bona fide*, and not in the nature of an evasion of the law prohibiting exemption from taxes."
>
> 89 Ga., 683, *The Cartersville Imp. Gas and Water Co. v. The Mayor and Aldermen of Cartersville.*

The final decree of the circuit court in the case at bar upheld the provision to the extent of ordering an accounting to ascertain the value of the water furnished under this clause of the contract, and directed that the value of the water so supplied be allowed as a credit against the amount assessed as taxes, and until such accounting should be had and the amount credited on the tax bills the injunction is continued of force (Record, pp. 168, 169).

We think that the city's action in levying and seeking to collect the taxes, contrary to the above provision of the contract, was the exercise of a strictly legislative authority in its character, and was an impairment of the obligation of the contract within the meaning of the impairment of the contract clause of the Constitution of the United States.

V.

We ask that the court review and consider its ruling that the bill failed to present a case under the Constitution of the United States, and that the bill should be dismissed for want of jurisdiction.

We believe the reasons above set forth will make it apparent to the court that the ordinances and acts of the city complained of in the bill are properly to be regarded as legislative in their character and are such as to have the effect of impairing the obligation of the contract.

As this court well says, the decisions on the two sides of the lines are very near to each other.

Unfortunately counsel for the appellee, embarrassed by the large number of propositions presented in the very numerous and diverse assignments of error, failed to direct their attention to a point not explicitly raised in the demurrer or answer or argued in the court below, and this court therefore was not directed to Georgia statutes and decisions, which, we think, very clearly bring the case within the principle laid down in the Walla Walla and Vicksburg cases and serve as clearly to distinguish it from *St. Paul Gaslight Co. v. St. Paul.*

We earnestly ask a rehearing in view of the importance of this case to these bondholders.

We ask the rehearing the more confidently because there are few more important or difficult questions, or which call for more earnest and careful consideration, than the question of what action on the part of a municipality constitutes legis-

lation within the meaning of the contract clause of the Constitution.

Competent foreign critics have observed that our cities constitute the danger point in American politics.

It is at that point the rights and liberties of the citizen are most seriously threatened, and it is there the safeguards afforded by the Constitution must be firmly upheld if that great instrument is to survive in all its pristine vigor.

There is no more wholesome feature in the American system of self-government than that which makes honesty and fidelity to obligations the corner-stone upon which the structure is builded.

As was well said by Mr. Chief Justice Marshall, "The convention appears to have intended to establish a great principle, that contracts should be inviolable."

We think that under a sound rule of interpretation, such a definition should not be adopted as would make the jurisdiction of the courts narrower than the right to be protected; narrower than would uphold the duty of the city, acting under powers delegated to it by the State, to respect and keep inviolate its contract obligations.

JOHN G. JOHNSON,
JOHN I. HALL,
OLIN J. WIMBERLY,
Attorneys and Counsel for Appellee.

CERTIFICATE.

The undersigned counsel for appellee hereby certify that in their opinion the grounds stated in the foregoing petition and in the accompanying brief are valid grounds in law for a rehearing of this case.

JOHN G. JOHNSON,
JOHN I. HALL,
OLIN J. WIMBERLY,
Counsel for Appellee.

BRIEF IN SUPPORT OF ABOVE PETITION.

I.

We think the court, in holding that the case at bar is governed by St. Paul Gaslight Co. *v.* St. Paul, 181 U. S., 142, and not by Walla Walla *v.* Walla Walla Water Co., 172 U. S., 1, did not have its attention brought to the extent of the power given by the legislature to the city of Dawson in respect to erecting its own water works or contracting for water.

The power, though conferred by legislation more general in its terms, yet as that legislation is construed and interpreted by the courts of the State, is as ample and broad as that given the city of Walla Walla by the act of the Territory of Washington incorporating that city. The power being the same, the city in either instance did exactly the same thing, namely, exercised the power in one of the two ways and later sought to execute it in the other—that is to say, in each case the city had the power to provide water for its inhabitants for fire protection and for domestic use, and could do this either by contract with a private party, individual, or corporation or by holding an election, issuing bonds, and erecting water works of its own. In each instance the city resorted first to the first of these methods and later, after the other contracting party had incurred large expense in putting itself in a position to carry out the contract, the city proceeded to adopt the second method, called an election, procured a vote favorable to the issue of the bonds, and was about to issue the bonds and build water works of its own when restrained by injunction.

Thus the two cases are in all substantial particulars identical. There is the minor difference that in the Walla Walla case the city claimed that the water company had failed to

carry out its contract, whereas in the case at bar there was neither complaint nor ground of complaint at the time the city elected to substitute water works under municipal ownership for water supply under contract with a water company.

In each case the city set up that the contract was void through want of power of the city to make it; and if in the Walla Walla case the city recognized the justice of paying for the water as long as it continued to use it, and in the case at bar the City of Dawson saw nothing wrong in continuing to use the water and enjoy fire protection after it ceased to pay for it, there is no less equity in the bill by reason of that fact.

In both cases the legislative authority under which the city acted was found in its charter (reinforced in the case at bar by the statute providing for the holding of bond elections), and there was no subsequent act of the legislature, or other legislature subsequent to the contract, except that which is found in the city's own acts.

In both cases the legislation alleged by the bill to be in impairment of the obligation of the contract consisted of an ordinance calling an election upon the question of issuing bonds to build water works, the holding of the election, the obtaining a vote carrying the proposition, and the city's admitted purpose of carrying into effect the authority so given.

In the Walla Walla case the city contracted not to erect water works of its own. As pointed out in the former brief, such is in substance and effect the contract of the city in the case at bar.

The cases, it will be seen, are therefore all fours with each other.

In *Vicksburg Waterworks Co. v. Vicksburg*, 185 U. S., 65, the city of Vicksburg, by an act of the legislature of the State of Mississippi approved March 18, 1886, was authorized "to provide for the erection and maintenance of a system of water works to supply said city with water, and to that end

to contract with a party or parties who shall build and operate water works." A contract was entered into, and the Vicksburg Waterworks Company succeeded to the rights of the original contracting party.

On March 9, 1900, the legislature passed an act authorizing the city to issue bonds, and purchase a system of water works to supply itself with water. The city held an election, at which it was voted the city should issue bonds to buy or construct water works for said city. The city passed a resolution or ordinance as follows:

"*Resolved*, That the mayor be and is hereby instructed to notify the Vicksburg Waterworks Company that the mayor and aldermen deny any liability upon any contract for the use of the water-works hydrants; that from and after August, 1900, they will pay reasonable compensation for the use of said hydrants; that the city attorney take such action as shall be necessary to determine the rights of the city in the premises."

This last-mentioned ordinance was in all substantial respects identical with the ordinance by which the city of Dawson repudiated its contract in the case at bar.

The city in each instance at the time of repudiating the contract decided upon a suit to determine the validity of the contract, with this difference: that, in the case of the city of Dawson, the city instructed its city attorney (not by resolution openly and in the light of day, but privately) to bring a suit against itself in the name of tax-payers friendly to its purpose, asking an injunction to restrain it from doing what it had by ordinance resolved not to do.

In the case at bar and in the Walla Walla case the legislative authority under which the city called an election upon the question of issuing bonds to build water works was by act antedating the contract. In the Vicksburg case the act of the legislature authorizing the election and, upon favorable vote, the issuing of bonds to build or buy water works was passed subsequently to the making of the contract.

This, as we conceive, can make no difference. The law looks at substance, at results reached, at that which is accomplished. The act of the legislature of Mississippi of March 9, 1900, it seems, did not require the city to issue the bonds or build or buy water works, nor, it seems, make it compulsory to submit the question to popular vote. It seems to have been permissive merely, and it was the city's ordinance which was the efficient agency in impairing the obligation of the contract.

And such was the ruling of this court in that case. The court say:

"As respects the act of March 9, 1900, it is contended by the complainant that it is unconstitutional for several reasons, chiefly, because it places an arbitrary valuation on the property of the complainant, and because it purports to authorize the city to build and operate water works of its own in derogation of the contract rights of the complainant.

"Whether this act of the legislature of Mississippi is, in its terms, subject to those objections, or whether it may be regarded as merely authorizing the city to proceed in such a manner as not to conflict with existing contract obligations, we need not determine at this stage of the case, because we think that the ordinance of the city of November 7, 1900, whereby the mayor was instructed to notify the water works company that the mayor and aldermen deny any liability upon any contract for the use of the water-works hydrants, and the subsequent action of the city in holding an election to authorize the issue of bonds to buy or construct water works of its own, and in refusing to pay the amount due and payable under the terms of the ordinance, do not present the mere case of a breach of a private contract to be remedied by an action at law, but disclose an intention and attempt, by subsequent legislation of the city, to deprive the complainant of its rights under an existing contract."

Vicksburg Waterworks Co. v. Vicksburg, 185 U. S., 65, pp. 81, 82 of opinion.

The acts of the city of Vicksburg in that case, which the court declares to disclose "an intention and attempt by sub-

sequent legislation of the city to deprive the complainant of its rights under an existiug contract," and which the court holds to present a case "within the meaning of the Constitution of the United States and within the jurisdiction of the circuit court as presenting a Federal question," are precisely the things which were done by the city of Dawson and which in the present bill are averred to be within the meaning of the Constitution of the United States and within the jurisdiction of the Federal court.

The matters to which we have above called the attention of the court we think will make it perfectly plain that the case at bar is not governed by *St. Paul Gaslight Co. v. St. Paul*, 181 U. S., 142, and it is perhaps unnecessary to say anything further with reference to that case. Inasmuch, however, as the general importance of the question presented would seem to merit a somewhat full and careful presentation, we will discuss the case even at the risk of unduly taxing the time of the court.

The case came to this court on a writ of error to the supreme court of Minnesota.

The case brought in the State court, and which afterwards went to the supreme court of the State (from whose decision writ of error was sued out to this court), was an action to recover the interest on the cost of construction of certain lamps mentioned in the ordinance below quoted. The complaint referred to the entire ordinance, in order to make a Federal question, but it seems no relief was sought but the recovery of money on a contract to pay money; and the statement of the cause of action would have been complete had all reference to the ordinance been omitted. If the refusal of the city to pay money did not constitute impairment, then there was no impairment so far as it could affect any relief prayer for or that could be granted in that case.

The charter of the St. Paul Gas Light Company empowered it to construct a plant to supply the city of St. Paul and its inhabitants with illuminating gas.

"The charter did not purpose to engage permanently with the company for lighting the city, but provided for agreements to be entered into on that subject with the city for successive periods, and from the beginning of the charter the parties did so stipulate for a specified time, a new contract supervening upon the termination of an expired one."

Under the provision of the charter the company was required, when directed by the city, to lay pipes and construct street lamps, provided the company should be satisfied the expenses would be justified by the income, and the city was required to pay therefor an interest of 8 per centum per annum on the amount of the sum of the original cost of said street lamps and lamp posts and the cost of laying and erecting the same.

After a considerable number of street lamps had been constructed, the company, by direction of the city, substituted electricity for gas in certain portions of the city (it being fairly deducible that the company's charter permitted), and hence the street lamps in those portions of the city which were lighted by electricity were no longer used.

"The gas company asserted its right to recover from the city the interest on the cost of placing in position the lamps, the use of which had been discontinued under the circumstances just above stated. The city denied its obligation to pay interest on account of the cost of these lamps."

The city passed an ordinance as follows:

"*Resolved*, That the St. Paul Gas Light Company be and it is hereby required forthwith to remove the gas street lamp posts in that portion of the city now lighted by electric light under contract with said company, and which said lamps have been discontinued by order of the board of public works.

"*Resolved, further*, That the board of public works is hereby required to transmit to the city comptroller a statement showing the number and location of said gas street lamp posts, not now in service in said electric light district above referred to, and that from and after the passage of

this resolution no interest be paid by the city of St. Paul to said St. Paul Gas Light Company on account of the cost of the purchase and equipment of said gas street lamp posts."

It was this ordinance which the gas light company claimed impaired the obligation of its contract.

It will be observed that there was no denial by the city of the validity of the contract—only a disagreement as to its proper interpretation.

It was not alleged that the removal of the lamp posts worked an injury to the gas company. On the contrary, the city's obligation to pay interest on the cost of the lamp posts, if such obligation existed, remained unaffected by the removal of the posts. The complaint alleged expressly that the obligation of the city to pay such interest on the cost of the lamps continued, although they were no longer in use for lighting purposes. No injunction was asked to restrain the city from removing the lamps, and it does not appear, so far as we can see from the report of the case, that the gas company objected to their removal.

The supreme court of Minnesota having interpreted the charter provision as not requiring the city to pay the gas company interest on the cost of the lamps after the city had ceased to use the gas and had contracted with the same company for electric lights for that portion of the city, the case was brought to this court on the ground that the ordinance impaired the obligation of a contract.

This court, in its consideration of the question, first states the two provisions of the ordinance which, it was claimed, had that effect, as follows, namely:

"It will be seen that only two subjects are therein referred to:

"(1.) The first, a command by the city to the gas company to 'forthwith remove the gas street lamp posts in that portion of the city now lighted by electric light under contract with the said company, which said lamps have been discontinued by order of the board of public works.'

"(2.) And, second, a declaration on the part of the municipal council of St. Paul of its intention not thereafter to pay the gas company interest on the cost of construction of the lamps so directed to be removed."

These two subjects or provisions the court proceeds to consider separately.

As to the first of these the court says:

"Now, it is apparent that the command given by the city to the gas company to remove the unused gas lamp posts from the streets in no way even tended to impair the obligation, if any, resting on the city to pay interest on the cost of the construction of the lamp posts which were ordered to be removed, since, in any event, if the contract imposed the obligation to make such payment, the duty of the city to do so was left absolutely unaffected by the order to remove. That is to say, if the duty to pay was created by the contract, such obligation to pay remained wholly untouched by the order of removal. This being true, it results that the order to remove the unused lamp posts cannot be treated as an impairment of the obligations of the contract without saying that such obligations were destroyed, although they were absolutely unaffected by the act which it is asserted brought about the impairment."

It will thus be seen that what the court holds as to this part of the ordinance is *not that it was not legislation*, but that it did not affect the obligation of the contract to pay.

And it is to be borne in mind, further, that the decision of the State court before this court for review, with respect to which it was claimed the obligation of the contract, was a decision solely upon the question of the city's obligation to pay interest on the cost of the lamps and not any other obligation which might have existed under the same contract. It was that question only that this court was undertaking to deal with. Its jurisdiction was invoked only with respect to the subject-matter of the suit and the subject-matter of the decision of the State court; and with respect to the obligation of the city to pay the interest on the cost of the lamps

this court says that the ordinance directing the lamp posts to be removed could not possibly affect that obligation, if the obligation existed.

That portion of the ordinance being thus disposed of, the court proceeds to take up and deal with the remaining portion of the ordinance, namely, the city's resolution that it would not pay interest on the cost of the aforesaid street lamp posts.

The question, therefore, reduced itself simply to this: Does a resolution of a city denying that it owes money, which the other party claims under a contract, as to the true meaning of which they disagree, constitute a law impairing the obligation of a contract?

As to this the court say:

"It was but a denial by the city of its obligation to pay, and a notice of its purpose to challenge in the future the existence of the duty to make such payment. This denial, whilst embodied in an ordinance, was no more efficacious than if it had been expressed in any other form, such as by way of answer filed on behalf of the city in a suit brought by the company against the city to enforce what it conceived to be its rights under the contract. When the substantial scope of this provision of the ordinance is thus clearly understood, it is seen that the contention here advanced of impairment of the obligations of the contract arising from this provision of the ordinance reduces itself at once to the proposition that wherever it is asserted on the one hand that a municipality is bound by a contract to perform a particular act and the municipality denies that it is liable under the contract to do so, thereby an impairment of the obligations of the contract arises in violation of the Constitution of the United States. But this amounts only to the contention that every case involving a controversy concerning a municipal contract is one of Federal cognizance, determinable ultimately in this court. Thus to reduce the proposition to its ultimate conception is to demonstrate its error."

The court does not hold that ordinances of a city substantially affecting some right of the other contracting party

under the contract, or rendering the contract less beneficial to him or his duties more onerous, are not laws impairing the obligation of the contract.

On the contrary, the court is careful to prevent any such inference being drawn from the decision.

The court declares:

"It is no longer open to question that a by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the State, having all the force of law within the limits of the municipality, that it may properly be considered as a law, within the meaning of the article of the Constitution of the United States."

Among the cases cited by the court upon this proposition is the Walla Walla case.

The court, in distinguishing the Walla Walla case from the case then before the court, thus states the ruling in the former case:

"In Walla Walla *v.* Walla Walla Water Company, 172 U. S., 1, the decision of the State court gave effect to a municipal ordinance which provided for the construction by the city of a new water-works plant which was to become a competitor with the contracting company."

The reference to the State court was an inadvertent error, the Walla Walla case not being a case coming up to this court from the State court, but an appeal from a circuit court of the United States, in which the suit was brought.

But this minor inadvertence does not affect the correctness of the clear and terse statement of the ground upon which Federal jurisdiction was predicated, namely, that the municipal ordinance "provided for the construction by the city of a new water-works plant which was to become a competitor with the contracting company."

This is precisely what the City of Dawson did also.

And what the City of Walla Walla did and what the City

of Dawson did the St. Paul case recognizes as widely removed and fundamentally different from a mere empty denial by resolution that the city regards itself as liable under the construction it places upon certain language in a contract the meaning of which is in dispute.

The Vicksburg case in the portion of the opinion already quoted draws the same distinction.

A resolution declaring that the city denies that the contract makes it liable is no more efficacious, is no more injurious to the other party, than a denial by way of answer in a suit. No right is abridged, no antagonistic action is taken.

When, however, the city undertakes the construction or passes an ordinance looking to the construction by the city of a new water-works plant which is to become a competitor with the contracting company, in disregard of its contract obligation that it will not do so, substantial rights conferred by the contract are impaired and destroyed. The State's delegated powers of taxation, of appropriating and using public moneys, of regulating the use of its streets, of legislating for the health and welfare of its inhabitants, and for the protection of property from fire, are turned into an active engine of destruction of rights which the contract secures to the other party, and it is just because the city is armed with these powers, and particularly because of the advantage the city has in possessing the power of taxation, that the water company cannot hope to successfully compete with the city, and of the two opposing systems of water works, that owned by the water company is sure to go the wall.

In the *Walla Walla case* this court declared:

"We know of no case in which it has been held that an ordinance, alleged to impair a prior contract with a gas or water company, did not create a case under the Constitution and laws of the United States. Granting that in respect to the two classes of cases above mentioned, responsibilities of a somewhat different character are imposed upon a municipality in the execution of its contracts, our attention has not

been called to an authority where the application of the constitutional provision as to the impairment of contracts has been made to turn upon the question whether the contract was executed by the city in its sovereign or proprietary capacity, provided the right to make such contract was conferred by the charter."

And the court held that such an ordinance constituted legislation in impairment of the obligation of the contract.

The *St. Paul case*, so far from qualifying the principal rule thus laid down, restates it, citing the Walla Walla case in support of it, as is above shown.

We have been unable to find a case in which the court qualifies or calls in question the soundness of this principle.

II.

The court in the opinion refers to the Federal question raised by the amended bill as an attempt by an afterthought to give jurisdiction.

This criticism is no doubt fully justified by the original framework of the bill, looking at it objectively.

Looking at the matter, however, from the subjective standpoint of what was in the pleader's mind, we ask leave to point out that the court is under an impression not wholly accurate.

The Walla Walla case, in which jurisdiction is predicated upon the existence of the Federal question, had been decided and is commented upon by the supreme court of Georgia in the decision in the Dawson Waterworks case, which last decision is referred to somewhat fully in the bill.

The contract, the rights under it, the city's obligation, the ordinances are pleaded in the bill, and it is alleged that these ordinances and the city's acts under them are all pleaded, and it is alleged that these ordinances and acts destroy the contract, and the rights thereby created, and it is upon this that relief is prayed.

The bill does not explicitly refer to the contract clause of the Constitution, nor are the words used aptly chosen with reference to the words used in that instrument.

When the demurrer or answer to the rule pointed out these defects, the amendment was offered, and without objection was allowed.

Every fact which goes to make up a case such as gives jurisdiction under the Constitution is set up minutely, particularly, and accurately in the bill as originally framed, save only that the case is not explicitly in terms stated to be a case arising under the Constitution. It was, however, believed by plaintiff that the amendment of the bill already brought would have the same effect as if the first bill had been withdrawn and a new bill had been filed, or the bill as originally framed had contained the averments added by the amendment.

The jurisdiction was invoked in good faith, and, acting upon the belief and in full reliance that such jurisdiction existed, the complainant has caused to be expended large sums of money in erecting a costly standpipe and bettering the service and in conducting an expensive litigation; the town has throughout the six years that have elapsed since the bill was brought been supplied with water and furnished fire protection for which it has paid nothing. This the plaintiff has done in its efforts to preserve the rights which have arisen under this contract from impairment and destruction. The right to recover the rentals for the earlier years, unless this suit stands, is lost through the bar of the statute of limitations.

We think, therefore, this plaintiff is entitled to invoke the benefit of the sound and just rule that a Federal question, raised in good faith, gives the Federal courts jurisdiction irrespective of what may be the ultimate decision of the court upon the merits.

Under any other rule the state of a person suing in the courts of the United States would, in cases in anywise bal-

anced with doubt, be so exposed to dangers and the risk of incurring great loss and hardship as to deter litigants in a large proportion of cases from asking the aid of those courts. This we do not believe the framers of the Constitution intended.

We think this the sound rule where the decisions on two sides of the question are near each other and the litigant seeks to have the question determined in the courts which the Constitution says are the proper courts to determine it, and vests with jurisdiction for that purpose.

We think, however, and have endeavored to point out, that the plaintiff's right is full and clear; that the court not only has jurisdiction, but a case is presented which entitled the plaintiff to relief conformable to the prayers of the bill.

JOHN G. JOHNSON,
JOHN I. HALL,
OLIN J. WIMBERLY,
Counsel for Appellee.

Supreme Court of the United States.

No. 154.—October Term, 1904.

The City of Dawson, Appellant,	}	~~In Error to~~ Appeal from the Circuit Court of the United States for the Northern District of Georgia.
vs.		
The Columbia Avenue Saving Fund, Safe Deposit, Title and Trust Company.		

[March 6, 1905.]

Mr. Justice Holmes delivered the opinion of the Court.

This is a bill in equity brought in the Circuit Court by the appellee, the Trust Company, as mortgagee of the Dawson Water Works Company, to restrain the City of Dawson from taking measures to build a new set of water works, and to compel it specifically to perform a contract made with the Water Works Company in 1890 to pay that company or its mortgagee a certain sum for the use of its water for twenty years. The Trust Company is a Pennsylvania corporation, and the only ground of jurisdiction for the bill as originally filed was diversity of citizenship. The bill, after stating the contract, set up a formal repudiation of the same by the city on June 27, 1894, refusals to pay for the water from that time, and attempts to collect taxes which by the contract were to be satisfied by the furnishing of water, but alleged a continued use of the water by the city. It further stated the calling of an election for December 12, 1894, to see if the city should issue bonds to erect or buy water works or electric lights, a vote in favor of the issue, an issue of ten thousand dollars for the erection of an electric light plant, and a present intent to sell the residue for the purpose of erecting new water works. It also alleged that the Water Works Company, recognizing the plaintiff's right to be paid the rentals for the water in the events which had happened, which had made the Water Works Company unable to pay the interest on the mortgage, had yielded to the plaintiff's demand that it should collect the rentals, and that the plaintiff had notified the city and had made demand, but that the city refused to pay. Other details are immaterial. The Water Works Company was made a party defendant and was served with process. An answer was served, although not filed, by the defendants other than the Water Works Company, setting up among other things that the Water Works Company was the real plaintiff, and was made defendant solely to avoid the effect of a decision by the Supreme Court of the State in a suit by

the Water Works Company against the city to the effect that the contract relied on was void. 106 Ga. 696. The answer on this ground denied the jurisdiction of the court. After service of this answer the bill was amended so as to allege that the acts of the city impaired the obligation of its contract, and deprived the plaintiff of its property without due process of law, contrary to the Constitution of the United States. A prayer was added also that the Water Works Company be decreed to perform its contract with the city, that thereby the rights of bondholders might be saved. The further proceedings do not need mention. They ended in a decree in accordance with the prayer, and the city appealed to this Court. *Davis & Farnum Mfg. Co.* v. *Los Angeles*, 189 U. S. 207, 216.

We are of opinion that the bill should have been dismissed for want of jurisdiction. The Water Works Company is admitted to have been a necessary party, and it, like the defendant city, was a Georgia corporation. It was made a defendant, but the Court will look beyond the pleadings and arrange the parties according to their sides in the dispute. When that is done it is obvious that the Water Works Company is on the plaintiff's side and was made a defendant solely for the purpose of reopening in the United States Court a controversy which had been decided against it in the Courts of the State. There was a pretense of asking relief against it, as we have stated, but no foundation for the prayer was laid in the allegations of the bill. On the contrary, it appears from those allegations that the Water Works Company insisted on its contract with the city, and did everything in its power to carry the contract out. It also recognized the plaintiff's right to receive the rentals and yielded to its demand. No difference or collision of interest or action is alleged or even suggested. If we assume that the plaintiff is more than an assignee of the city's contract to pay, which we do not intimate, still, when the arrangement of the parties is merely a contrivance between friends for the purpose of founding a jurisdiction which otherwise would not exist, the device cannot be allowed to succeed. See *Removal Cases*, 100 U. S. 457, 469; *Hawes* v. *Oakland*, 104 U. S. 450, 453; *Detroit* v. *Dean*, 106 U. S. 537, 541; *Doctor* v. *Harrington*, *ante*. Act March 3, 1875, c. 137, § 5. 18 Stat. 472.

The attempt by an afterthought to give jurisdiction by setting up constitutional rights must fail also. The bill presents a naked case of breach of contract. The first step of the city was to repudiate the contract and to refuse to pay. Whatever it may have done subsequently, its wrong, if, contrary to the decision of the Supreme Court of the State, there was a wrong, was complete then. The repudiation and refusal were kept up until the bill was filed and the other acts were subsequent, subordinate to and in aid of them. The mere fact that the city was a municipal corporation does not give to its refusal the character of a law impairing the obliga-

tion of contracts or deprive a citizen of property without due process of law. That point was decided in *St. Paul Gaslight Co.* v. *St. Paul*, 181 U. S. 142, 150.

Undoubtedly the decisions on the two sides of the lines are very near to each other. But the case at bar is governed by the one which we have cited and not by *Walla Walla* v. *Walla Walla Water Co.*, 172 U. S. 1, which is cited and distinguished in *St. Paul Gaslight Co.* v. *St. Paul.* In *Vicksburg Waterworks Co.* v. *Vicksburg*, 185 U. S. 65, the city had made a contract with the Water Works Company, and afterwards a law was passed authorizing the city to build new works. The city, acting under this law, denied liability, and took steps to build the works, whereupon the Water Works Company filed its bill, alleging the law to be unconstitutional. The bill was held to present a case under the Constitution. In the case before us there was no legislation subsequent to the contract, and it is not even shown that there is color of previous legislation for the city's acts. Those acts are alleged to be unlawful, and the allegation would be maintained by showing that they were not warranted by the laws of the State. See *Hamilton Gas Light Co.* v. *Hamilton City*, 146 U. S. 258, 266; *Lehigh Water Co.* v. *Eaton*, 121 U. S. 388, 392. We repeat that something more than a mere refusal of a municipal corporation to perform its contract is necessary to make a law impairing the obligation of contracts or otherwise to give rise to a suit under the Constitution of the United States. The decree of the Circuit Court must be reversed and the cause remanded with instructions to dismiss the bill. *Newburyport Water Co.* v. *Newburyport*, 193 U. S. 561, 576.

Decree reversed.

Mr. Justice ~~Brewer~~ and Mr. Justice McKENNA dissented.

Brewer

Mr. Justice WHITE, not having been present at the argument, took no part in the decision.

True copy.

Test:

Clerk Supreme Court, U. S.